Supreme Court, U.S.
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No. 96-359

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

E. B. Rood and
R. Bruce McLaughlin, *Petitioners*,
v.
The City of Oldsmar, a Florida
Municipal Corporation, *Respondent*.

On Petition for a Writ of Certiorari to the
District Court of Appeal
of the Second District of Florida

PETITION FOR A WRIT OF CERTIORARI
REPLY BRIEF

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QUESTION PRESENTED FOR REVIEW

1. Whether the District Court of Appeal failed to follow the mandate found in the Fifth and Fourteenth Amendments to the Constitution of the United States when it reinstated a Declaratory Judgment action seeking a declaration that Comprehensive Plan designations were arbitrary and capricious, without reinstating a companion action for damages?

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
ISSUES RAISED BELOW	3
THE FILING OF THIS PETITION	7
ARGUMENT	7
THE PETITION WAS TIMELY FILED	7
PROCEEDINGS BELOW	8
A DECISION WAS HAD FROM THE HIGHEST AVAILABLE STATE COURT	9
THERE IS A FEDERAL QUESTION IN THIS CASE AND THE DECISIONS BELOW REFLECT THE FEDERAL QUESTION	9
CONCLUSION	10

Supplemental Appendices

Conclusion to Petitioners' Initial Brief to Florida's Second District Court of Appeal SA-1

Respondent's Answer Brief to Florida's Second District Court of Appeal SA-3

Motion for Reconsideration SA-89

Express Mail Waybill SA-100

Original Mailing to Respondent SA-101

TABLE OF AUTHORITIES

Cases:

Supreme Court of the United States:

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, (1987) 10

Howlett v. Rose, 496 U.S. 356 (1990) 2

Constitution of the United States:

Amendment V i, 2, 10

Amendment XIV i, 2, 10

United States Code:

28 U.S.C. § 1257(a) 1

42 U.S.C. § 1983 2, 9

Florida Statutes:

§ 163.3194(1)(b) 3

§ 163.3231 5

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PETITION FOR A WRIT OF CERTIORARI REPLY BRIEF

E. B. Rood and R. Bruce McLaughlin respectfully submit this their Reply Brief in support of their Petition for Writ of Certiorari. Respondent, City of Oldsmar, has raised several new issues in its Brief in Opposition, and Petitioners reply to these new issues.

Interestingly, the City does not address the merits of the Petition. It does not because it cannot. There is no question that, as a matter of Constitutional law, the Second District Court of Appeal erred in reinstating the count seeking a Declaratory Judgment that the City's Comprehensive Plan was arbitrary and capricious, without reinstating the companion damage count.

As to the new issues raised by the City, Petitioner would respectfully comment as follows.

JURISDICTION

This Honorable Court does have jurisdiction pursuant to 28 U.S.C. § 1257(a). As set out below, all prerequisites to this Court's jurisdiction have been performed or have occurred.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners properly cited (Petition at 3 - 4) the

applicable Federal Constitutional and statutory provisions. In the Third and Fourth Amended Complaints before the Trial Court, Petitioners invoked that Court's jurisdiction pursuant to 42 U.S.C. § 1983 and to the Fifth and Fourteenth Amendments to the Constitution of the United States. See, with respect to the issue before this Court, Appendix at A-33, ¶¶ 4, 5 and 6, A-36; ¶ 15; A-82, ¶ 173; A-105, ¶ 248; A-106-107, ¶¶ 257 and 258; A-108-109, ¶ 263; (third amended complaint;) and A-124-125, ¶¶ 4, 5 and 6; A-128, ¶ 15; A-153, ¶ 101 (Fourth Amended Complaint).

Therefore, Petitioners properly pled, **before the Trial Court** and ever since, the relevant and applicable Federal Constitutional and Statutory provisions. In a mandate to the same District Court of Appeal, this Court held [1] that the state courts have concurrent jurisdiction over actions brought under 42 U.S.C. § 1983. Therefore, these Federal Constitutional and statutory challenges were properly before the Courts throughout this matter.

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[1] *Howlett v. Rose*, 496 U.S. 356, (1990)

STATEMENT OF THE CASE

The parties are generally in accord with respect to the facts before the Trial Court. While the City is correct that the Comprehensive Plan supersedes the Zoning Ordinance, the fact remains that Petitioners' properties were zoned as set forth (Petition at 4 - 5) and that there was, therefore, a conflict between the Comprehensive Plan and the Zoning Ordinance.

The City was required [2] to make its Comprehensive Plan and Zoning Ordinance consistent with one another, but it failed to do so. The City cannot now claim that it should benefit from its failure to comply with Florida law. Further, while Rood and McLaughlin's predecessor obtained their lands based on the Zoning, it is the arbitrary and capricious of the **Comprehensive Plan** which is at issue herein.

ISSUES RAISED BELOW

It should also be noted that, as required by the Florida Rules of Appellate Procedure, Rule 9.110, Petitioners filed a notice of appeal from the dismissal with prejudice of certain counts of the Third Amended Complaint. That appeal was then abated

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[2] § 163.3194(1)(b), Florida Statutes, 1987.

until the adjudication of the Fourth Amended Complaint. Throughout the appellate process, both parties sought an adjudication of the dismissal of **both** the Third and Fourth Amended Complaint.

In the "Conclusion" of Appellants' Initial Brief to the District Court. (Supplemental Appendix [3] at SA-1), Petitioners prayed that:

> "The Orders of the lower Court should be reversed, and this matter should be remanded for an adjudication of the Fourth Amended Complaint and of Counts III, V, VII, VIII, IX, X and XI of the Third Amended Complaint." SA at SA-1 - SA-2

Count IX of the Third Amended Complaint (Appendix at A-103 - A-109, ¶¶ 239 - 264) is the Count which is at issue before this Court.

The City responded in kind, arguing before the District Court:

> "Count IX, alleging arbitrary and capricious land use designations, was properly dismissed because of a fatal repugnancy between the complaint and exhibits thereto, whereby the appellants stipulated the reasonableness

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[3] Reproduced in this Reply Brief, herinafter "SA at ___".

of the challenged designations; and also because the appellants acquired the land with actual or constructive notice of the land's Comprehensive Plan designations; and also because § 163.3231, Fla. Stat. (1987) bound them to the designations in the Comprehensive Plan." SA at SA-25.

Furthermore, both parties briefed and argued **both** those counts which were dismissed with prejudice from the Third Amended Complaint, **and** the dismissal of the Fourth Amended Complaint. See, *e.g.* the City's Answer Brief, SA at SA-3, *et.seq.* Further, the City's Brief to the District Court included approximately 50 direct [4] references to the Third Amended Complaint (of which at least seven were to Count IX,) and, *inter alia*, the following headings:

"III. The Prior, 6-20-94 Order Properly Dismissed with Prejudice from the Third Amended Complaint Counts III, V, VII, VIII, IX, X, AND XI." SA at SA-24

"III. In its 6-20-94 Order Concerning the

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[4] *I.e.* not in quoted passages.

Third Amended Complaint, the Trial Court Properly Dismissed with Prejudice Counts III, V, VII, VIII, IX, X, AND XI" SA at SA-59.

"a) The Trial Court Properly Dismissed Count IX of the Third Amended Complaint with Prejudice." SA at SA-84.

Further, the City introduced an entire section of its Answer Brief (SA at SA-60) with the "note" that the subject section referred to the Third Amended Complaint.

Therefore, both parties litigated before the highest state Court with jurisdiction, the dismissal with prejudice of Count IX of the Third Amended Complaint, which count sought damages for the imposition of an arbitrary and capricious Comprehensive Plan designation, and was the companion to an identical, approved Declaratory Judgment count.

The City cannot now be heard to allege that Petitioners waived or abandoned Count IX of the Third Amended Complaint. (If this position had any merit, it should have been raised before the District Court and not, for the first time, before this Court.)

THE FILING OF THIS PETITION

The City also suggests that this Petition for Writ of Certiorari should be denied because it was not timely filed. The contrary is true. Reproduced at SA-98 is the Express Mail Waybill showing that the Petition was timely mailed on September 4, 1996 and reproduced at SA-99 is the original envelope (which was misaddressed,) to the City Attorney. [5] (The error in addressing the City's copies of the Petition was not prejudicial as it took **eight days** (October 7 to October 15, for Petitioners to receive the Brief in Opposition, whereas the initial Petition, being local mail, presumable was delivered on September 8th or 9th, four or five days after filing, as opposed to eight days.)

ARGUMENT

THE PETITION WAS TIMELY FILED

As set out in the foregoing statement of the case, the Petition was timely filed, having been mailed in accordance with Rule 29.2, on the last day permitted by Justice Kennedy's Order.

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[5] The originals of these documents are being filed with the Court.

PROCEEDINGS BELOW

Petitioners agree with the City that the crux of their petition relates to whether or not Count IX of the Third Amended Complaint (Appendix at A-103, *et.seq.*,) should have been reinstated by the District Court. The City, in what can only be construed as an affirmative effort to mislead this Honorable Court, suggests that Petitioners acquiesced to the ruling and "waiv[ed] their appeal to the dismissal of the Third Amended Complaint." (Brief in Opposition at 5.)

However, as set forth in the Statement of the Case herein, the contrary is true. Petitioners sought the reversal of that ruling by the District Court; the City, in its Answer Brief to the District Court, discussed the Third Amended Complaint at least 50 times and directed at least two separate sections of that Brief to the Third Amended Complaint. The City cannot now be heard to suggest that Petitioners "waived their appeal" of the dismissal of the Third Amended Complaint. [6] Further, in their Motion for Recon-

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[6] The cases cited by the City in support of the proposition that Petitioners waived their appeal of the dismissal of the Third Amended Complaint are so totally inapposite as not to merit discussion herein.

sideration to the District Court (SA at SA-89, *et.seq.*,) Petitioners specifically addressed the question that is before this Court.

Therefore, the dismissal with prejudice of Count IX of the Third Amended Complaint was properly and timely raised, and is properly before this Court.

A DECISION WAS HAD FROM THE HIGHEST AVAILABLE STATE COURT

As set out above, the dismissal with prejudice of Count IX of the Third Amended Complaint was adjudicated by the highest Court of the state from which a decision can be had.

THERE IS A FEDERAL QUESTION IN THIS CASE AND THE DECISIONS BELOW REFLECT THE FEDERAL QUESTION

As set out in the Statement of Case, *supra*, the jurisdiction of the Trial Court was invoked pursuant to 42 U.S.C. § 1983, *et.seq.* and the federal question of the arbitrary and capricious land use designation was litigated throughout the proceedings below. The District Court found that Petitioners had alleged a cause of action sufficient for a Declaratory Judgment

action declaring that the Comprehensive Plan designations were arbitrary and capricious, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Therefore, under Federal Constitutional law, Petitioners are entitled to an adjudication of the corresponding damage claim: *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, (1987).

CONCLUSION

The instant Petition for Writ of Certiorari was timely filed with this Court, and promptly served on the City. There is a significant and important Federal Constitutional question herein - whether a Plaintiff is entitled to a Declaratory Judgment declaring a land use regulation to be arbitrary and capricious but not to a corresponding damage action. This question was decided adversely to Petitioners by the highest state court from which a decision can be had.

This cause is properly before this Court, and this Court should grant certiorari and reverse the decision so that Petitioners may seek both prongs of their Constitutionally guaranteed remedy.

Respectfully submitted,

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CONCLUSION TO PETITIONERS (APPELANTS') INITITAL BRIEF

CONCLUSION

This is a complex law suit. There are numerous, separate and distinct causes of action, all of which must be pled herein, both to plead the necessary ultimate facts, and to avoid a later defense of issue preclusion. While the Complaint herein is lengthy, it is necessarily so, and has been significantly shorted. Within the parameters of the law and rule, the Complaint complies with the rules of pleading.

Dismissal of certain counts was based on facts not appearing in the record, affirmative defenses, and by the Court going beyond the four corners of the Complaint. Appellants stated causes of action which should not have been dismissed. Further, Appellants strictly complied with the Rules of Civil Procedure and with the previous Orders of the Court. Further, Counts previously approved were not subject to a renewed test by Motion to Dismiss, and Appellants were entitled to add a new theory of recovery which ripened during the case. Appellants stated causes of action for rescission and duress. The Exhibits were neither inconsistent with, nor negated the Complaint,

and were not repugnant to the Complaint. The counts related to the attachment of the Comprehensive Plan to its Ordinance did not accrue until discovery in this matter, and were not barred by the statute of limitations. Appellants properly pled jurisdiction for civil rights violations, and were entitled to present their case on its merits.

Florida law prefers an adjudication on the merits, rather than dismissal of a case based on technical impediments. The Orders of the lower Court should be reversed, and this matter should be remanded for an adjudication of the Fourth Amended Complaint and of Counts III, V, VII, VIII, IX, X and XI of the Third Amended Complaint.

IN THE DISTRICT
COURT OF APPEAL OF FLORIDA
SECOND DISTRICT [*]

E.B. ROOD et al.,
Plaintiffs/Appellants,

v. Case No. 94-02479

THE CITY OF OLDSMAR et al.,
Defendants/Appellees.

_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PINELLAS COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEES, THE CITY OF OLDSMAR, THOMAS PINTA, AND NICK STASZKO

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[*] The Table of Contents and the Table of Citations are omitted from the City's Answer Brief, as reproduced herein.

APPELLEES' RESPONSE TO THE APPELLANTS' STATEMENT OF THE CASE AND OF THE FACTS

The appellants in this case are E.B. ROOD, Esq., a trial lawyer who has been a member of the Florida Bar for decades and who is a past president of the American Trial Lawyers' Association, and R. BRUCE McLAUGHLIN, a planning and real estate consultant. The appellees are THE CITY OF OLDSMAR; THOMAS PINTA (Mayor or Councilman at all relevant times); and NICK STASZKO (Community Development Director at all relevant times), with Mr. Pinta and Mr. Staszko sued in their individual capacities. Mr. Pinta and Mr. Staszko concur with and join in the positions and arguments of the city.

The appellants have made a basic error in their Statement of the Case and of the Facts. They have repeatedly reported as facts items which are merely allegations in their Third Amended Complaint or Fourth Amended Complaint. For example, in the final paragraph of page 1 of the appellants' Statement, they state as a fact that "Rood, under duress, purchased capacity from the City . . . ." The assertion of duress is not a fact, but merely the

central allegation of Count VII of the appellants' Third Amended Complaint, which count was dismissed with prejudice in the 6-20-94 order on appeal. R 847-848, 851.

For further example, on page 4 of their Statement, the appellants state as a fact that "Defendant Thomas Pinta, in order to enhance his son's ability to obtain the Collen/McLaughlin property, led the City away from good faith negotiations, and the Amended Development Agreement could never be implemented." These assertions are not facts, and do not even appear in the Fourth or Third Amended Complaints; at best they are elaborations of allegations made in ¶¶ 32 and 149 of the Fourth Amended Complaint, R 909, 936.

Thus, the city objects to the appellants' Statement of the Case and of the Facts because it states mere allegations as facts. However, the city accepts the Statement as a summary of the allegations of the Third and Fourth Amended Complaints, with the exception noted in the paragraph above, and with the exceptions noted after the next two paragraphs.

The 10-20-94 order on appeal (R 946-947) involuntarily dismissed the action under Rule 1.420(b) on the grounds (a) that the appellants'

Fourth Amended Complaint did not comply with the trial court's 6-20-94 order (R 843-851) to streamline the five counts that survived the same order's dismissal with prejudice of the seven other counts of the Third Amended Complaint, and (b) that the appellants' Fourth Amended Complaint re-pleaded counts that were dismissed with prejudice from the Third Amended Complaint, and (c) that the appellants' Fourth Amended Complaint raised new causes of action without leave of court.

As to the 6-20-94 order (R 843-851), the appellants have appealed its dismissal with prejudice of Counts 3, 5, 7, 8, 9, 10, and 11 of the Third Amended Complaint. Although that same order commanded the appellants to streamline the remaining five counts per Rule 1.110 so as to make them "concise [and] plain," the appellants have nowhere appealed this order to streamline, neither in their Notice of Appeal, R 861, nor in their corresponding Statement of Judicial Acts to be Reviewed, R 876.

EXCEPTIONS TO THE APPELLANTS' STATEMENT OF THE CASE AND OF THE FACTS, WHICH THE CITY ACCEPTS SOLELY AS A SUMMARY OF THE ALLEGATIONS OF THE THIRD AND FOURTH AMENDED COMPLAINTS:

Exception 1. On page 1 of their Statement, the appellants claim that

> "When Rood and McLaughlin's predecessor in title (Keith Collen) acquired the properties, the properties were zoned General Commercial (C-2) on the S.R. 584 frontage and Residential Planned Development at 7.5 units per acre for the balance of the properties. Under the City of Oldsmar Comprehensive Plan, all of Rood's property was in a Residential designation and all of McLaughlin's property was in an Open Space designation." (Emphasis added.)

This is at best highly misleading, and at worst fraud on the court. This is so because the appellants neglect to inform this Court of ¶¶ 92-94 (R 923) of their Fourth Amended Complaint, which correctly allege that the city adopted its Comprehensive Plan in 1980 (¶ 92), and that the zonings reported by the appellants in their Statement are superseded zonings

under the prior 1972 Oldsmar Zoning Ordinance (¶¶ 93-94). The appellants do admit in the first paragraph of their Statement that they acquired their properties in 1982 (Rood and Collen) and 1992 (McLaughlin, as Collen's successor).

Thus, the appellants acquired their properties two or twelve years after the Oldsmar Comprehensive Plan became law in 1980, which superseded the 1972 Zoning Ordinance and zonings thereunder. Therefore, it is highly misleading or even fraudulent for them to state to this Court that "[w]hen Rood and McLaughlin's predecessor in title (Keith Collen) acquired the properties, the properties were zoned General Commercial (C-2) on the S.R. 584 frontage and Residential Planned Development at 7.5 units per acre for the balance of the properties." (Appellants' Statement of the Case and of the Facts, ¶ 2; emphasis added.)

Exception 2. On page 5 of their Statement, the appellants claim that they attacked the legality of the City's Comprehensive Plan partly on the basis that "no Plan was ever attached to the adopting Ordinance." However, reference to Count V of the Third Amended Complaint reveals ¶ 187, which alleges only that "No Land Use Element of the

Comprehensive Plan is attached to Ordinance 80-12 . . . ." (R 303; emphasis added). This is not an allegation that the plan was never attached to the adopting ordinance; nor is it an allegation that the plan was unattached to the adopting ordinance at the time of passage.

This count was dismissed with prejudice, R 851, and therefore was not repleaded in the Fourth Amended Complaint.

Exception 3. On pages 6 and 7 of their Statement, the appellants set forth a table comparing the Third and Fourth Amended Complaints. The city submits the following exceptions and additions to that table.

As to COUNTS I, II, IV, and XII of the Third Amended Complaint: it is misleading to state that the disposition of these counts was merely that these counts were "Approved" by the trial court. It is likewise misleading to state that, as to COUNT VI, the disposition was merely "Dismissed without Prejudice." Instead, the trial court ordered streamlining of all these counts, thus:

"On the whole, the Court finds the Plaintiffs' complaint inordinately long, complicated and replete with legal conclusions, assumptions and speculative statements of fact. Moreover, the

complaint is replete with contradictions, repugnancies and redundancies while containing textbook phrases of zoning with broad allusions to law that are on the whole deficient.

" . . . justice demands that the Plaintiffs, in their Fourth Amended Complaint, replead the valid causes of action in compliance with Rule 1.110, Florida Rules of Civil Procedure, which requires a concise, plain statement of facts." Order of Court, dated 6-17-94, filed 6-20-94, pp. 8-9, R 850-851 (emphasis added).

The Court reiterates these words 12 lines later:

"Moreover, the Plaintiffs' Fourth Amended Complaint shall replead the valid causes of action in compliance with Rule 1.110, Florida Rules of Civil Procedure, which requires a concise, plain statement of facts." 6-20-94 Order of Court, R 851.

As to COUNT VIII of the Third Amended Complaint, the correct title thereof is "Refusal to Terminate Development Agreement and Refund Fees." The appellants correctly report in their table that this count was dismissed with prejudice. However, they do not report that two counts titled exactly the same were pleaded in the Fourth

Amended Complaint as Counts IV and VI thereof, seeking, respectively, an injunction and damages, and claiming in these versions that termination of the original, 1988 development agreement had been accomplished by the passage of time. The city's position with regard to these counts was that either they were barred as being amended versions of the same-titled COUNT VIII of the Third Amended Complaint, which had been dismissed with prejudice, and which thus could not be presented anew, even in an amended version; or that they were new causes of action, presenting new issues and varied grounds for relief, and therefore barred under the doctrine of "departure in pleading." Cox v. Seaboard Coast Line Railroad Co., 360 So.2d 8 (Fla. 2d DCA 1978), cert. denied, 367 So.2d 1123 (Fla. 1979):

> "[I]t is equally well established that [Rule 1.190(c)] does not authorize a plaintiff, under the guise of an amendment, to state a new and different cause of action. Consequently, an amendment will not be allowed if the amendment will change an issue, introduce new issues, or materially vary the grounds of relief." Id. at 9; likewise, Dunn v. Campbell, 166 So.2d 217 (Fla. 2d DCA 1964); and Bondu v. Gurvich, 473 So.2d 1307 (Fla. 3d DCA

1984), rev. denied, 484 So.2d 7 (Fla. 1986). See Argument 11-B, below.

As to COUNT XI of the Third Amended Complaint, the appellants state in their table thus: "Individual Defendants in Default." The individual defendants--THOMAS PINTA (Mayor or Councilman at all relevant times) and NICK STASZKO (Community Development Director at all relevant times)--are appellees in this appeal, and deny that they were ever in default, and point out that there was never any clerk's entry of default or any court order adjudicating default.

The appellees also disagree with the appellants' statement that this count was "Dismissed with Prejudice as to City Defendant Only." The order, R 851, is not so limited; and the dismissal with prejudice was not voluntary on plaintiffs' part, and accordingly extended to all parties sued. Osborne v. Shell Oil Co., 104 So.2d 670 (Fla. 1st DCA 1958):

> "When an involuntary dismissal occurs, the suit is dismissed and it carries all the parties and the entire action out of court." Id. at 671, and authorities cited therein.

Thus it was improper for the appellants to duplicate this prejudicially dismissed COUNT XI almost

entirely verbatim as Count VIII in the Fourth Amended Complaint, with the only difference being the elimination of the city as a defendant.{[1]}

In addition, even assuming arguendo that the count survived as to the individual defendants, it was still properly dismissed under Rule 1.420(b), because, other than deleting the city from the count, the appellants reproduced it verbatim, contrary to the court's 6-20-94 order to streamline all surviving counts so as to render them concise and plain in accordance with Rule 1.110. 6-20-94 Order, R 851.

Exception 4. On page 8 of their Statement of the Case and of the Facts, the appellants state that the defendants missed the 8-3-94 due date for their Answer to the Fourth Amended Complaint and that "[a]lthough in default, the City filed a Motion to

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[1] The appellees refer to "Count VIII" of the Fourth Amended Complaint in an attempt to avoid confusion that will otherwise result from an error of the appellants. Appellants' first Count VI appears on p. 30 of the Fourth Amended Complaint, R 932. Their next count--"Slander of Title"--is also identified as Count VI (R 933). Compounding this error, their subsequent count--"Delay"--is misnumbered as "Count VII" (R 935). The appellees will refer to these misnumbered counts by the numbers that they should have borne, namely Count VII (Slander of Title) and Count VIII (Delay).

Dismiss with Prejudice, and an untimely Motion for Enlargement of Time in which to respond to the final complaint." The city denies that it was ever in default, and points out that there was never any clerk's entry of default or any court order adjudicating default. The city also points out that its motion was a "Rule 1.420(b) Motion for Involuntary Dismissal," R 940-942, and denies that its 8-8-94 Motion for Extension of Time was untimely, given that Fla.R.Civ.P. 1.090(b)(2) authorizes such post-deadline motions.

Exception 5. On page 9 of their Statement, at footnote 7, the appellants state that "[a] small portion of the reduction [in length of the Fourth Amended Complaint] did come from the dismissal with prejudice of certain counts in the Third Amended Complaint." The city disagrees; in fact, because the 6-20-94 Order dismissed with prejudice seven of the twelve counts of the Third Amended Complaint, the reduction in length of the Fourth Amended Complaint as compared to the Third stems overwhelmingly from the removal of the counts dismissed with prejudice, and from the removal of the multitudinous paragraphs in the "INTRODUCTION" that related to the counts

dismissed with prejudice. The failure of the appellants to streamline the surviving counts is amply demonstrated in the city's "Table Comparing the Wording of the Fourth Amended Complaint with That of the Third Amended Complaint," which is set forth in the "Argument" section of this brief, at part II-3, below. That table demonstrates that the counts alleged in the Fourth Amended Complaint are duplicated almost entirely verbatim from the corresponding counts in the Third Amended Complaint, and that in those instances where paragraphs of counts in the Fourth Amended Complaint are not verbatim reproductions of their predecessors, they are mostly longer than their predecessors. Such failure to streamline violated the trial court's 6-20-94 order, R 850-851, and led to the 10-20-94 order dismissing the cause under Rule 1.420(b) for noncompliance with the 6-20-94 order. R 946-947.

Exception 6. On page 9 of their Statement, the appellants assert that their claim of expiration of the 1988 Development Agreement--embodied in Counts IV and VI of the Fourth Amended Complaint--"had not ripened until the filing" of that complaint, because of the "necessary exhaustion of

administrative remedies." The city disagrees. Reference to page 23 of their Initial Brief reveals that the appellants define as an "administrative remedy" their quest "to determine if the City would consider the agreement terminated, and restore them to their pre-Agreement status." Such inquiry or negotiation is simply not an administrative remedy. Accordingly, Counts IV and VI of the Fourth Amended Complaint are barred by res judicata, because those counts' claim of expiration of the agreement on 2-4-93 could have been raised, but were not raised, in either the Second Amended Complaint (filed 3-16-93, R 128-256) or in the Third Amended Complaint (filed 8-27-93, R 265-442). "[U]nder res judicata all issues that were or could have been raised in the action are concluded by the judgment whether raised or not." Trawick's Florida Practice and Procedure (1994 ed.), § 25-13, p. 410, citing and paraphrasing Gordon v. Gordon, 59 So.2d 40 (Fla. 1952):

"[R]es adjudicata . . . is founded upon the sound proposition that there should be an end to litigation and that in the interest of the State every justiciable controversy should be settled in one action in order that the courts and the parties will not be pothered

for the same cause by interminable litigation . . . under res adjudicata a final decree or judgment bars a subsequent suit between the same parties based upon the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised." Gordon at 44 (emphasis added).

Accordingly, plaintiffs' claim in Counts IV and VI of the Fourth Amended Complaint, that the Development Agreement allegedly expired on February 4, 1993--over 6 months before the filing of the Third Amended Complaint, and over 5 weeks before the filing of the Second Amended Complaint--cannot avoid rejection under res judicata, because it is a matter germane to the identically titled cause of action set forth in the dismissed Count VIII, and such claim could have been raised in that Count in the Third Amended Complaint, or even in the corresponding count in the Second Amended Complaint.

Exception 7. Concerning the "new counts" discussed in "Exception 6," above, the appellants state thus:

"While it may have been prudent for Plaintiffs to seek the prior leave of the Court to add these counts, the Court could certainly have required and

granted a motion for leave to amend." Appellants' Statement of the Case and of the Facts, p. 9.

This is frivolous. The appellants admit that they filed no such motion for leave, but now claim that it was up to the trial court to tell them to file such a motion, and on top of that to grant it. This is simply not the responsibility of the court.

Exception 8. On page 9 of their Statement, the appellants accuse the City of "[l]eading the lower Court to misunderstandings of the law and the facts, and . . . creating an impossible standard for Plaintiffs to meet the City's demand for shorter pleadings at the same time the City demanded more detail in the Complaint . . . ." The City denies that it led the lower court to "misunderstandings of the law and the facts."

The City also denies that it created an "impossible" double standard of lengthening and shortening. Reference to page 17 of the appellants' brief reveals that what they are talking about is two instances wherein the city appropriately complained about omissions: once where the appellants, having alleged jurisdictional statements in their general introduction to the Fourth Amended Complaint, did not re-allege them by reference in Counts I through IV thereof;

and once where the city appropriately complained about vagueness in Count XI ("Delay") of the Third Amended Complaint.

That objection to vagueness as to one of the twelve counts in the Third Amended Complaint is not, as the plaintiffs would have it, a wholesale insistence that the entire complaint be lengthened. It is rather an insistence that this count be a plain statement of ultimate facts at the same time that it be concise. If this is contradictory, then so is Rule 1.110(b), which commands precisely that every Florida complaint contain "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." The trial court insisted on no more and no less than what the rule requires, R 850-851 ("the Plaintiffs' Fourth Amended Complaint shall replead the valid causes of action in compliance with Rule 1.110, Fla. R. Civ. P., which requires a concise, plain statement of facts"), and the failure to fulfill this requirement, universal to all Florida complaints, contributed to the Rule 1.420(b) dismissal for noncompliance with the order of the court. 10-20-94 Order, R 946-947.{[2]}

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[2] Nor is the federal-style "notice pleading" acceptable in Florida courts. Continental Baking Co. v. Vincent, 634 So.2d 242 (Fla. 5th DCA 1994):

"We note, however, that the above-discussed pair of orders suggests the lower court's rulings on petitioner's motions may have been affected by the previous rulings of the federal district court. This is cause for concern. The pleading standard in federal court and the pleading standard in our state courts differ radically. The federal courts only require notice pleading; Florida is a fact-pleading jurisdiction. *See generally* Sherman Cohn, *Notice Pleading: End of a 55-Year Experiment*, Am. Inns of Court Fed.Prac.Dig. 17 (11th Cir. ed., Apr. 1993). The quality of pleading that is acceptable in federal court and which will routinely survive a motion to dismiss for failure to state a claim upon which relief may be granted will commonly not approach the minimum pleading threshold required in our state courts. Florida's pleading rule forces counsel to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort. The fact that a pleading of a state law claim in a diversity case in federal court has survived a motion to dismiss says nothing about whether the claim meets the pleading standard required in our state courts." Id. at 244 (emphasis added).

The appellants' citation of the Rios case is to no avail. Although that case does speak of Florida pleading as "notice pleading," it is plain from the context quoted by the appellants themselves that the notice required by Florida must be given by pleading ultimate facts sufficient to state a cause of action. Rios v. McDermott, Will & Emery, 613 So.2d 544, 545 (Fla. 3d DCA 1993); quoted in the appellants' Initial Brief, p. 19.

SUMMARY OF ARGUMENT

I. Without a Transcript of the Hearing Which Generated the Rule 1.420(b) Order Challenged in this Appeal, the Order Must be Affirmed. This Court has never been furnished with a transcript of the hearing which generated the 10-20-94 order being challenged in this appeal. The order resolved factual issues, and was not fundamentally erroneous on its face. Therefore, it must be affirmed. Southeast Bank, N.A. v. David A. Steves, P.A., 552 So.2d 292 (Fla. 2d DCA 1989).

II. Alternatively, the 10-20-94 Order Should be Affirmed Because the Trial Court Did Not Abuse Its Discretion in Dismissing the Action Under Rule 1.420(b), Given that the Appellants Failed to Comply with the Prior Order of the Court. The standard of review for an order dismissing an action under Rule 1.420(b) is whether the trial court abused its discretion. Dewitt v. Rossi, 559 So.2d 659 (Fla. 5th DCA), rev. denied, 574 So.2d 140 (Fla. 1990); Lutheran Senior Citizens' Foundation, Inc. v. B.F. Schumacher, 355 So.2d 861, 863 (Fla. 3d DCA 1978), cert. denied, 361 So.2d 833 (Fla. 1978). The appellants have made no argument whatsoever in their Initial Brief that the trial court abused its

discretion by granting the city's Rule 1.420(b) Motion for Involuntary Dismissal. Therefore the appellants have waived any such argument, and the order granting that motion should be affirmed. Nor can they now raise an "abuse of discretion" argument in their forthcoming Reply Brief. J.A.B. Enterprises v. Gibbons, 596 So.2d 1247, 1250 (Fla. 4th DCA 1992).

Without waiving the appellants' waiver of the abuse of discretion argument, the appellees submit that the court properly exercised its discretion in granting the Rule 1.420(b) motion. In the oft-cited case of Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), the Supreme Court defined the abuse of discretion standard thus:

> " 'discretion is abused only where no reasonable man would take the view adopted by the trial court.' " Id. at 1203 (citation omitted; emphasis added).

Rule 1.420(b) authorizes involuntary dismissal of an action "for failure of an adverse party to comply with . . . any order of court." The Court's prior, 6-20-94 order commanded that appellants' forthcoming Fourth Amended Complaint "replead the valid causes of action in compliance with Rule 1.110, Florida

Rules of Civil Procedure, which requires a concise, plain statement of facts." R 851 (emphasis added). However, the appellants disobeyed this order, and mostly reproduced verbatim the corresponding counts of the Third Amended Complaint in their Fourth Amended Complaint, and also added new allegations, all as shown at the comparative table set forth in Argument II-3, below.

By substantially duplicating the counts instead of rewriting them so as to make them "concise" and "plain," as the court ordered, the appellants failed to comply with the court's order, and violated Rule 1.110(b) as well. Thus, under Rule 1.420(b), as well as under case law, the trial court properly dismissed the action with prejudice. Dewitt v. Rossi, 559 So.2d 659 (Fla. 5th DCA), rev. denied, 574 So.2d 140 (Fla. 1990); Lutheran Senior Citizens' Foundation, Inc. v. B.F. Schumacher, 355 So.2d 861, 862-863 (Fla. 3d DCA 1978), cert. denied, 361 So.2d 833 (Fla. 1978). Because it cannot be said that "no reasonable man would take the view adopted by the trial court," the trial court did not abuse its discretion, Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). Therefore, the 10-20-94 order of dismissal should be affirmed.

If the Court affirms on the basis of the arguments set forth in either Parts I or II, above, then it will not be necessary for the Court to consider the remaining arguments in this brief, since such an affirmance will moot the remainder.

III. The Prior, 6-20-94 Order Properly Dismissed with Prejudice from the Third Amended Complaint Counts III, V, VII, VIII, IX, X, AND XI. The trial court properly dismissed with prejudice Counts III, VII, VIII, IX, and XI, because they had all previously been dismissed twice, and withdrawn once, as set forth in detail in footnote 14, on pages 34-35, below.

In addition, Count III (and its companion, Count VIII) was properly dismissed because of fatal repugnancies between the complaint and exhibits thereto, whereby the trigger alleged for contract termination was shown not to exist in the contract. Count V (and its companion, Count X) was properly dismissed because, after thirteen years of public acquiescence in the substance of the ordinance adopting the city's Comprehensive Plan, which all the while guided the city's development, public policy forbade the appellants' attack on the validity of the ordinance because of alleged procedural

irregularities; and because it introduced new issues or materially varied the grounds of relief; and because of the Statute of Limitations.

Count VII, seeking rescission via duress, was properly dismissed because nothing alleged in it rose to the level of duress. Count IX, alleging arbitrary and capricious land use designations, was properly dismissed because of a fatal repugnancy between the complaint and exhibits thereto, whereby the appellants stipulated the reasonableness of the challenged designations; and also because the appellants acquired the land with actual or constructive notice of the land's Comprehensive Plan designations; and also because § 163.3231, Fla. Stat. (1987) bound them to the designations in the Comprehensive Plan.

Count XI, alleging a taking under 42 U.S.C. § 1983, was properly dismissed because of a fatal repugnancy within the count, i.e., although the appellants claimed that the city refused to approve any reasonable development proposal and so took all economically beneficial use of Plaintiffs' property, they contradicted themselves by conceding that a marketable site plan was approved in the 1988 contract. Nor did they state any facts supporting

jurisdiction of the court over this count.

ARGUMENT

I. BECAUSE THIS COURT WAS NOT FURNISHED WITH A TRANSCRIPT OF THE HEARING WHICH GENERATED THE RULE 1.420(b) ORDER BEING CHALLENGED IN THIS APPEAL, APPELLANTS HAVE FAILED TO DEMONSTRATE A BASIS FOR REVERSAL IN THE RECORD, AND THEREFORE THE RULE 1.420(b) ORDER INVOLUNTARILY DISMISSING THE ACTION MUST BE AFFIRMED

2. Where There Is No Transcript or Proper Substitute Therefor, a Judgment which Is Not Fundamentally Erroneous on Its Face Must be Affirmed. After the appellants filed their Fourth Amended Complaint, R 903-939, the city filed a "Rule 1.420(b) Motion for Involuntary Dismissal" of the appellants' action. R 940-942. The issues at the hearing on the motion were those set forth in the motion, and were factual issues. Specifically, those issues were:

- whether the appellants had disobeyed the prior, 6-20-94 court order by failing to "replead the valid causes of action in compliance with Rule 1.110, Florida Rules of Civil Procedure, which requires a concise, plain statement of facts," as required by the trial court in that order, R 851, 940-942; and
- whether the appellants had also disobeyed the same order by improperly repleading in the Fourth Amended Complaint two counts that the prior order had dismissed with prejudice from the Third Amended Complaint, R 851, 940-942.

After the hearing, the trial court granted the motion in an order rendered on 10-20-94. R 946-947.{[3]}

This Court has never been furnished with a transcript of the hearing which generated the 10-20-94 order being challenged in this appeal. The order

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[3] This 10-20-94 order is one of the two orders appealed by the plaintiffs in the instant appeal. The other is the prior, 6-20-94 order dismissing with prejudice seven counts of the Third Amended Complaint. R 843-851; R 861 (Notice of Appeal); R 876 (Statement of Judicial Acts to be Reviewed); R 948 (Amended Notice of Appeal). If the Court affirms the 10-20-94 order dismissing the action, the appeal of the 6-20-94 order will be mooted thereby.

resolved factual issues, and was not fundamentally erroneous on its face. Therefore, it must be affirmed. Southeast Bank, N.A. v. David A. Steves, P.A., 552 So.2d 292 (Fla. 2d DCA 1989):

"Because this court was not furnished with a transcript of the hearing which generated the order being challenged in this appeal, appellants have failed to demonstrate a basis for reversal in the record, and we must affirm therefor. As this court recently stated in *In re Guardianship of Georgina H. Read*, 555 So.2d 869, 871 (Fla. 2d DCA 1989): 'In appellate proceedings, the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error. *Applegate v. Barnett Bank*, 377 So.2d 1150 (Fla.1979) . . . Where there is no record of the testimony of witnesses or of evidentiary rulings and where a statement of the record has not been prepared, a judgment which is not fundamentally erroneous on its face must be affirmed.' " Southeast Bank at 293.

The Supreme Court provided additional reasons why the lack of a transcript requires affirmance, in Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979):

"Even when based on erroneous reasoning, a conclusion or decision of a trial court will generally be affirmed if the evidence or an alternative theory supports it . . .

"The trial court's [order] could well be supported by evidence adduced at trial but not stated in the judge's order or otherwise apparent in the incomplete record on appeal. The question raised by Barnett Bank clearly involves underlying issues of fact. When there are issues of fact the appellant necessarily asks the reviewing court to draw conclusions about the evidence. Without a record of the trial proceedings, the appellate court can not properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory. Without knowing the factual context, neither can an appellate court reasonably conclude that the trial judge so misconceived the law as to require reversal. The trial court should have been affirmed because the record brought forward by the appellant is inadequate to demonstrate reversible error." Id. at 1152 (citations omitted; emphasis added).

Nor can the appellants now supplement the record

by ordering a transcript from the court reporter:

> "While Florida Rule of Appellate Procedure 9.200(f)(2) does provide that '[i]f the court finds the record is incomplete, it shall direct a party to supply the omitted parts of the record,' that rule is inapplicable under the circumstances of this case where there is a complete lack of a transcript of the record below or of a statement of the proceedings pursuant to Florida Rule of Appellate Procedure 9.200(b)(3)." Southeast Bank at 293 (emphasis added).{[4]}

For these reasons, the 10-20-94 order dismissing the action under Rule 1.420(b) should be affirmed.

If the Court affirms on the foregoing basis, then it will not be necessary for the Court to consider the remaining arguments in this brief.

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[4] This Court reiterated its Southeast Bank analysis and holdings in Pertz v. Zohar, 556 So.2d 459 (Fla. 2d DCA 1990). Likewise, Clayton v. Clayton, 442 So.2d 310, 311 (Fla. 1st DCA 1983) ("we find that the lack of a trial transcript or a proper substitute is a fatal flaw in appellant's case").

II. ALTERNATIVELY, THE 10-20-94 ORDER SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE ACTION UNDER RULE 1.420(b), GIVEN THAT THE APPELLANTS FAILED TO COMPLY WITH THE PRIOR ORDER OF THE COURT

3. The Standard of Review Is Abuse of Discretion; Appellants' Waiver of This Argument; Definition Thereof. The standard of review for an order dismissing an action under Rule 1.420(b) is whether the trial court abused its discretion. Dewitt v. Rossi, 559 So.2d 659, last paragraph (Fla. 5th DCA), rev. denied, 574 So.2d 140 (Fla. 1990); Lutheran Senior Citizens' Foundation, Inc. v. Schumacher, 355 So.2d 861, 863 (Fla. 3d DCA), cert. denied, 361 So.2d 833 (Fla. 1978). The appellants have made no argument whatsoever in their Initial Brief that the trial court abused its discretion by granting the city's Rule 1.420(b) Motion for Involuntary Dismissal. Therefore the appellants have waived any such argument, and the order granting that motion should be affirmed. Nor can they now raise an "abuse of

discretion" argument in their forthcoming Reply Brief. J.A.B. Enterprises v. Gibbons, 596 So.2d 1247 (Fla. 4th DCA 1992):

"Further, appellants' initial brief does not raise the issue of their failure to receive a copy of the compensation order. Appellants' reply brief denies that they received the order, however, an issue not raised in an initial brief is deemed **abandoned** and may not be raised for the first time in a reply brief. Thus, appellants cannot argue to this court that they did not receive the compensation order. Therefore, once deemed received, appellants' failure to appeal also requires us to hold that the compensation order had become final before the summary judgment hearing took place. AFFIRMED." Id. at 1250 (emphasis added; citation omitted.) To the same effect are Wingate v. United Services Automobile Association, 480 So.2d 665, 666 (Fla. 5th DCA 1985); Lynch v. Tennyson, 443 So.2d 1017, 1019 (Fla. 5th DCA 1983), overruled on other grounds, Pierce v. Progressive American Insurance, 582 So.2d 712, 715 (Fla. 5th DCA 1991); F.M.W. Properties, Inc. v. Peoples First Financial Savings and Loan Association, 606 So.2d 372, 377 (Fla. 1st DCA 1992), and additional authorities cited therein;

and McDonald v. Pickens, 544 So.2d 261 (Fla. 1st DCA 1989):

"[S]ince that argument has not been included in appellant's brief it **is not cognizable on appeal."**[5] Id. at 264 (emphasis added).

Without waiving the appellants' waiver of the abuse of discretion argument, the appellees submit the following analysis showing that the court properly exercised its discretion in granting the Rule 1.420(b) motion.

In the oft-cited case of Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), the Supreme Court defined the abuse of discretion standard thus:

"We cite with favor the following statement of the test for review of a judge's discretionary power:

'Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If

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[5] *Appellees' Note:* "Cognizable" means "[c]apable of being tried or examined before a designated tribunal; within jurisdiction of court or power given to court to adjudicate controversy." Black's Law Dictionary, 6th ed. (1990), p. 259, col. 2.

reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.' *Delno v. Market Street Railway Company*, 124 F.2d 965, 967 (9th Cir. 1942).

"In reviewing a true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the 'reasonableness' test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial judge should be disturbed only when his decision fails to satisfy this test of reasonableness." Canakaris, 382 So.2d at 1203 (emphasis added).

4. There Was No Abuse of Discretion, Because the Appellants Failed to Comply with the Prior Order of the Court. Rule 1.420(b) authorizes involuntary dismissal of an action "for failure of an adverse party to comply with . . . any order of court." The Court's prior, 6-20-94 order (R 843-851, dismissing seven of twelve counts of the Third Amended Complaint) commanded that appellants' forthcoming

Fourth Amended Complaint "replead the valid causes of action in compliance with Rule 1.110, Florida Rules of Civil Procedure, which requires a concise, plain statement of facts." R 851 (emphasis added). However, the appellants disobeyed this order.

First, the Fourth Amended Complaint mostly reproduces word-for-word the corresponding portions of the Third Amended Complaint. Second, where the reproductions are not verbatim, generally they are longer than in the Third Amended Complaint. Third, the Fourth Amended Complaint adds allegations of new grounds, absent from all four previous versions of the complaint, in its Counts IV and VI.{[6]} Such verbatim reproduction and lengthening of the allegations are in direct contravention of the Court's order. That order found and commanded as follows:

> "On the whole, the Court finds the Plaintiffs' complaint inordinately long, complicated and replete with legal conclusions, assumptions and

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[6] The Fourth Amended Complaint has fewer pages overall than the Third Amended Complaint only because the plaintiffs eliminated five of the seven counts that were dismissed with prejudice from the Third, along with a number of paragraphs in the Introduction relating to the counts dismissed with prejudice.

speculative statements of fact. Moreover, the complaint is replete with contradictions, repugnancies and redundancies while containing textbook phrases of zoning with broad allusions to law that are on the whole deficient.

" . . . justice demands that the Plaintiffs, in their Fourth Amended Complaint, replead the valid causes of action in compliance with Rule 1.110, Florida Rules of Civil Procedure, which requires a concise, plain statement of facts." Order of Court, dated 6-17-94, filed 6-20-94, pp. 8-9, R 850-851 (emphasis added).

The Court reiterates these words 12 lines later:

"Moreover, the Plaintiffs' Fourth Amended Complaint shall replead the valid causes of action in compliance with Rule 1.110, Florida Rules of Civil Procedure, which requires a concise, plain statement of facts." 6-20-94 Order of Court, R 851.

Nevertheless, the appellants disobeyed both statements of the Court's order commanding repleading in compliance with Rule 1.110, "which requires a concise, plain statement of facts." Order of Court, R 851. The table set forth below shows how the allegations of the Fourth Amended

Complaint reproduce verbatim, or substantially verbatim, the corresponding allegations of the Third Amended Complaint. Because the appellants have substantially mimicked the very wording of the Third Amended Complaint that the Court ordered substantially changed, the Fourth Amended Complaint is neither concise nor plain.

TABLE COMPARING THE WORDING OF THE FOURTH AMENDED COMPLAINT WITH THAT OF THE THIRD AMENDED COMPLAINT

¶¶ in 4th Amended Percentage Verbatim, or Other	**Source ¶¶ in 3d Amended Complaint**	**Verbatim, or**
INTRODUCTION		
¶ 1	¶ 1	Verbatim
¶ 2	¶ 2	Verbatim
¶ 3	¶ 3	Verbatim, with original 2d sentence deleted
¶ 4	¶ 4	Verbatim

¶ 5	¶ 5	Verbatim
¶ 6	¶ 6	Verbatim
¶ 7	¶ 7	Verbatim
¶ 8	¶ 8	Verbatim
¶ 9	¶ 9	Verbatim
¶ 10	¶ 10	Verbatim
¶ 11	¶ 11	Verbatim {[7]}
¶ 12	¶ 12	Verbatim
¶ 13	¶ 13	Verbatim
¶ 14	¶ 14	Verbatim
¶ 15	¶ 15	Verbatim
¶ 16	¶ 16	Verbatim
¶ 17	¶ 17	Verbatim
¶ 18	¶ 18	Verbatim
¶ 19	¶ 19	Verbatim
¶ 20	¶ 21	Verbatim
¶ 21	¶ 22	Verbatim
¶ 22	¶ 23	Verbatim
¶ 23	¶ 24	Verbatim
¶ 24	¶ 25	Verbatim

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[7] In this and in some of the other paragraphs of the Fourth Amended Complaint, the original phrase "attached hereto" has been replaced by the phrase "attached to the Third Amended Complaint." Because this is a purely procedural change, paragraphs in which this is the change are reported as "Verbatim."

¶ 25	¶ 26	Verbatim
¶ 26	¶ 27	Verbatim
¶ 27	¶ 28	Verbatim
¶ 28	¶ 29	Verbatim
¶ 29	¶ 30	Verbatim
¶ 30	¶ 31	Verbatim
¶ 31	¶ 32	Verbatim
¶ 32	¶ 33	Verbatim
¶ 33	¶ 34	Verbatim
¶ 34	¶ 35	Verbatim
¶ 35	¶ 36	Verbatim
¶ 36	¶ 37	Verbatim
¶ 37	¶ 38	Verbatim
¶ 38	¶ 59	Verbatim
¶ 39	¶ 63	78% Verbatim; new version is 24% longer than the old {[8]}

[8] This means that 78% of the words in this paragraph in the Fourth Amended Complaint appeared in the corresponding paragraph in the Third Amended Complaint. The comparative length of the corresponding paragraphs is determined by word count.

¶ 40	¶ 64	Verbatim
¶ 41	¶ 65	Verbatim
¶ 42	--	New
¶ 43	¶ 94	75% verbatim; new version is 33% longer than the old
¶ 44	¶ 96	Verbatim
¶ 45	¶ 97	Verbatim
¶ 46	¶ 98	Verbatim
¶ 47	¶ 99	Verbatim
¶ 48	¶ 100	82% Verbatim; new version is 10% longer than the old
¶ 49	¶ 101	Verbatim
¶ 50	¶ 102	Verbatim
¶ 51	¶ 103	Verbatim
¶ 52	¶ 104	75% Verbatim; new version is 19% shorter than

		the old (new claim: expiration)
¶ 53	¶ 105	50% Verbatim; new version is one word longer than the old (new claim: expiration)
¶ 54	¶ 106	Verbatim, except for deletion of first word, "Further"
¶ 55	¶ 107	31% Verbatim; new version is twice as long as the old (new claim: expiration)
¶ 56	¶ 108	Verbatim

¶ 57	¶ 109	Verbatim
¶ 58	¶ 110	88% Verbatim; new version is 14% longer than the old (new claim: expiration)
¶ 59	¶ 111	Realleges prior paragraphs
¶ 60	¶ 112	Verbatim
¶ 61	¶ 113	Verbatim
¶ 62	¶ 114	Verbatim
¶ 63	¶ 115	Verbatim
¶ 64	¶ 116	Verbatim
¶ 65	¶ 117	Verbatim
¶ 66	¶ 118	Verbatim
¶ 67	¶ 120, 131, 164	61% Verbatim; new version is 38% longer than the old
¶ 68	¶ 121, 132, 165	53% Verbatim;

		new version is 42% longer than the old
COUNT I		
¶ 69	¶ 119	Realleges prior paragraphs
¶ 70	¶ 49	Verbatim
¶ 71	¶ 50	81% Verbatim; new version is 23% longer than the old
¶ 72	¶ 51	Verbatim
¶ 73	¶ 123	Verbatim
¶ 74	¶ 55	Verbatim
¶ 75	¶ 56	Verbatim
¶ 76	¶ 57	Verbatim
¶ 77	¶ 58	Verbatim
¶ 78	¶ 125	Verbatim
¶ 79	¶ 126	Verbatim, with a 12-word clause deleted
¶ 80	¶ 127	Verbatim

¶ 81	¶ 128	Verbatim
¶ 82	¶ 129	Verbatim
COUNT II		
¶ 83	¶ 130	Realleges prior paragraphs
¶ 84	¶ 133	Verbatim
¶ 85	¶ 134	72% Verbatim; new version is 38% longer than the old (new claim: expiration)
¶ 86	¶ 135	Verbatim
¶ 87	¶ 136	Verbatim
¶ 88	¶ 137	Verbatim
¶ 89	¶ 138	Verbatim
¶ 90	¶ 139	Verbatim
COUNT III		
¶ 91	¶ 163	Realleges prior paragraphs
¶ 92	¶ 166	65% Verbatim;

		new version is 55% longer than the old
¶ 93	¶ 167	87% Verbatim; new version is 15% longer than the old
¶ 94	¶ 168	Verbatim, with the addition of one word
¶ 95	¶ 169	Verbatim
¶ 96	¶ 170	81% Verbatim; new version is 23% longer than the old
¶ 97	¶ 171	Verbatim
¶ 98	¶ 45	95% Verbatim; new version has three new words
¶ 99	¶ 172	Verbatim

¶ 100	¶ 47	Verbatim
¶ 101	¶ 173	Verbatim
¶ 102	¶ 174	Verbatim
¶ 103	¶ 175	Verbatim
¶ 104	¶ 176	Verbatim
¶ 105	¶ 177	Verbatim
¶ 106	¶ 178	Verbatim
¶ 107	¶ 179	Verbatim
¶ 108	¶ 180	Verbatim
¶ 109	¶ 181	Verbatim
¶ 110	¶ 182	Verbatim
COUNT IV		
¶ 111	¶ 214	Realleges prior paragraphs
¶ 112	¶ --	(New claim: expiration)
¶ 113	¶ --	(New claim: expiration)
¶ 114	¶ --	(New claim: expiration)
COUNT V		
¶ 115	¶ 192	Realleges prior paragraphs

¶ 116	¶ 193	54% Verbatim; new version is 60% longer than the old
¶ 117	¶ 51	Rewritten; new version is 33% shorter than the old
¶ 118	¶ 55	Rewritten; new version is 24% shorter than the old
¶ 119	¶ 52	Rewritten; new version is 79% shorter than the old
¶ 120	¶ 194	Verbatim
¶ 121	¶ 195	Verbatim
¶ 122	¶ 196	Verbatim
¶ 123	¶ 197	Verbatim
¶ 124	¶ 198	Verbatim,

		with last sentence omitted
¶ 125	¶ 200	Rewritten; new version is 46% shorter than the old
¶ 126	¶ 199	Verbatim
¶ 127	¶ 200	Verbatim
¶ 128	¶ 201	Verbatim
¶ 129	¶ 202	Verbatim
COUNT VI		
¶ 130	¶ 214	Realleges prior paragraphs
¶ 131	¶ --	(New claim: expiration)
¶ 132	¶ --	(New claim: expiration)
¶ 133	¶ --	(New claim: expiration)
COUNT VII		
¶ 134	¶ 292	Realleges prior

		paragraphs
¶ 135	¶ 293	Verbatim
¶ 136	¶ 294	Verbatim
¶ 137	¶ 295	Verbatim
¶ 138	¶ 296	Verbatim
¶ 139	¶ 297	Verbatim
¶ 140	¶ 298	Verbatim
COUNT VIII		
¶ 141	¶ 277	Realleges prior paragraphs
¶ 142	¶ 278	Verbatim
¶ 143	¶ 279	Verbatim
¶ 144	¶ 280	Verbatim {[9]}
¶ 145	¶ 281	Verbatim
¶ 146	¶ 282	Verbatim
¶ 147	¶ 283	Verbatim
¶ 148	¶ 284	Verbatim
¶ 149	¶ 285	Verbatim
¶ 150	¶ 286	Verbatim
¶ 151	¶ 287	Verbatim
¶ 152	¶ 288	Verbatim
¶ 153	¶ 289	Verbatim

[9] The new version is identical to the old, except that it deletes Oldsmar as a defendant.

¶ 154	¶ 290	Verbatim
¶ 155	¶ 291	Verbatim

Because the Fourth Amended Complaint substantially mimics and reproduces the overlong and over-elaborate wording of the Third Amended Complaint, then just like the Third Amended Complaint it is inevitably "inordinately long, complicated, and replete with conclusions, assumptions, and speculative statements of fact." 6-20-94 Order, R 850. As such, the Fourth Amended Complaint fails to comply with the Court's order commanding adherence to Rule 1.110 via streamlining of the complaint. Such noncompliance justified involuntary dismissal of the entire action. Dewitt v. Rossi, 559 So.2d 659 (Fla. 5th DCA), rev. denied, 574 So.2d 140 (Fla. 1990); Lutheran Senior Citizens' Foundation, Inc. v. B.F. Schumacher, 355 So.2d 861 (Fla. 3d DCA 1978), cert. denied, 361 So.2d 833 (Fla. 1978).

In Lutheran, the appellate court upheld the trial court's dismissal with prejudice of the second amended complaint therein. The same reasons that justified the dismissal in that case justified dismissal in this case:

"The second amended complaint contained counts

and allegations that were both moot and prolix, in contravention of Fla.R.Civ.P. 1.110(b)(2). In addition, appellant not only failed to eliminate those lengthy and superfluous matters from the second amended complaint, as required by the prior order of the court dated April 4, 1975, but in fact added additional allegations.

"Florida courts have long held that a plaintiff may be required to amend or recast a complaint, disposing of burdensome allegations. In that appellant was ordered to streamline his pleading and failed to do so, the trial court, upon its discretion, had the authority to dismiss the second amended complaint. See Fla.R.Civ.P. 1.420(b) . . . the order of dismissal is hereby affirmed." Lutheran, 355 So.2d at 863 (emphasis of "added" is in original; remaining emphasis is added; citations omitted).

Just as in Lutheran, the appellants at bar "not only failed to eliminate those lengthy and superfluous matters from the second amended complaint, as required by the prior order of the court . . . but in fact added additional allegations {[10]}. . . [the

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[10] The appellants claim that "Counts IV [seeking an injunction] and VI [seeking damages], respectively, [of the

Fourth Amended Complaint], although captioned the same" as Count VIII of the Third Amended Complaint (*"Refusal to Terminate Development Agreement and Refund Fees"*), are "new counts" because they "seek a Declaratory Judgment that the original Development Agreement is now terminated by the operation of time . . . . " Initial Brief, pp. 22-23. Assuming *arguendo* that plaintiffs are indeed raising a new cause of action in Counts IV and VI, then they constitute "additional allegations" of the sort decried in Lutheran as contrary to the trial court's order to streamline the complaint. In addition, they would be barred by the doctrine of "departure in pleading," in that these counts change an issue, introduce new issues, or materially vary the grounds of relief. Cox v. Seaboard Coast Line Railroad Co., 360 So.2d 8 (Fla. 2d DCA 1978), cert. denied, 367 So.2d 1123 (Fla. 1979); Dunn v. Campbell, 166 So.2d 217 (Fla. 2d DCA 1964); and Bondu v. Gurvich, 473 So.2d 1307 (Fla. 3d DCA 1984), rev. denied, 484 So.2d 7 (Fla. 1986). See Argument 11-B, below.

New allegations of expiration were also added to ¶¶ 52, 53, 55, 58, and 85 of the Fourth Amended Complaint; the first four of these paragraphs are realleged by reference in every one of the eight counts. New allegations concerning the collector road were added to ¶¶ 43 and 48 of the Fourth Amended Complaint, and are likewise realleged in every count.

If Counts IV and VI are not new, but are instead amended versions of old counts, then each is barred by the doctrine of res judicata, because the corresponding count of each in the Third Amended Complaint--Count VIII--was dismissed with prejudice. "[U]nder res judicata all issues that were or could have been raised in the action are concluded by the judgment whether raised or not."

appellants were] ordered to streamline [their] pleading and failed to do so . . . . " Id.{[11]} Accordingly, the involuntary dismissal of the action under Fla.R.Civ.P. 1.420(b) was proper, involved no abuse of discretion, and should be affirmed:

> "The trial judge having exercised his discretion, **and appellant having failed to demonstrate an abuse of that discretion**, the order of dismissal is hereby affirmed." Id. (Emphasis added.)

Likewise, in Dewitt v. Rossi, 559 So.2d 659 (Fla. 5th DCA), rev. denied, 574 So.2d 140 (Fla. 1990), the appellate court upheld the trial court's dismissal

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Trawick's Florida Practice and Procedure (1994 ed.), § 25-13, p. 410, citing and paraphrasing Gordon v. Gordon, 59 So.2d 40 (Fla. 1952).

[11] Plaintiffs were ordered to streamline the causes of action that survived dismissal with prejudice. Accordingly the plaintiffs cannot successfully claim compliance with the trial court's order merely by pointing to their elimination of most of the counts that were dismissed with prejudice. What the Court ordered streamlined were the remaining counts ("the Plaintiffs' Fourth Amended Complaint shall replead the valid causes of action in compliance with Rule 1.110, Fla. R. Civ. P., which requires a concise, plain statement of facts," R 851), and it is the plaintiffs' failure to streamline those counts so as to comply with the 6-20-94 order of the court that justified the Rule 1.420(b) dismissal on 10-20-94.

with prejudice of the amended complaint for violation of Rule 1.110(b). Again, the same reasons that justified the dismissal in that case justified dismissal in this case:

"The trial court granted the motion on the basis that 'several paragraphs in the amended complaint contained multiple or narrative allegations, involving multiple sets of circumstances, making a cumbersome pleading difficult to respond to' . . . {[12]}

"On appeal, Dewitt poses the issue as being simply whether she stated a cause of action, however cumbersome, for breach of contract (against the Rossis) and contractual interference (against the Boehmes). The appellees, on the other hand, see the issue as being the right of the trial court to dismiss a complaint violative of the Rules of Civil

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[12] Likewise, the instant appellants are guilty of such cumbersome pleading, especially at ¶¶ 51, 8, 78, 86, and 123 of the Fourth Amended Complaint (R 912-913, 905, 918-919, 921, 929-930); and because the Fourth Amended Complaint substantially duplicates the relevant counts of the Third Amended Complaint, then just like the Third, the Fourth Amended Complaint is inevitably "inordinately long, complicated, and replete with conclusions, assumptions, and speculative statements of fact." 6-20-94 Order, R 850.

Procedure.

"We agree with the appellees. Under Rule 1.110(b), Florida Rules of Civil Procedure, a complaint is required to contain a short and plain statement of the grounds upon which the court's jurisdiction depends, and must also contain a short and plain statement of the ultimate facts showing that the pleader is entitled to relief . . .

"Rule 1.420(b) (involuntary dismissal) states that any party may move for dismissal of an action or of any claim against him for failure of an adverse party to comply with the Rules or any order of the court . . . In the instant case, we see no abuse of discretion by the trial court in requiring compliance with the rules of pleading and, after allowing the opportunity for amendment, granting dismissal . . . AFFIRMED." Dewitt, 559 So.2d at 659 (underlined emphasis added).

By substantially duplicating the counts instead of rewriting them so as to make them "concise" and "plain," as the court ordered, the appellants disobeyed the court's order, and violated Rule 1.110(b) as well. Under Rule 1.420(b) and the authorities cited above, the trial court properly dismissed the action with prejudice. Because it

cannot be said that "no reasonable man would take the view adopted by the trial court," the trial court did not abuse its discretion, Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). Therefore, the 10-20-94 order of dismissal should be affirmed.

5. Repleading Counts Dismissed with Prejudice. The trial court's 6-20-94 order dismissed Counts VIII and IX of the Third Amended Complaint with prejudice. R 851, ¶ 2. Such an order necessarily commanded that the appellants not waste the trial court's time, the taxpayers' money, and the appellees' time and money, by repleading those counts. Nevertheless, as found by the trial court in its 10-20-94 order, R 946, the appellants defied the court by repleading those counts as Counts IV, VI, and VIII of their Fourth Amended Complaint. Such defiance justified involuntary dismissal under Rule 1.420(b).{[13]}

So rare is such defiance that the appellees have

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[13] See Exceptions 3 and 6 to "Appellees' Response to Appellants' Statement of the Case and of the Facts," and footnote 10, above, analyzing alternative views of Counts IV and VI of the Fourth Amended Complaint as either entirely new counts invalidated by the doctrine of departure in pleading, or as old counts dismissed with prejudice and therefore improperly repleaded in amended form.

found no authority on point. However, the trial court has the inherent power to prevent frivolous litigation, and that court properly exercised that power below under Rule 1.420(b) to discourage refilings again and again of counts dismissed with prejudice.

6. The Condition on Which Various Counts of the Third Amended Complaint Were "Approved" Was Not Fulfilled; Therefore the Court Properly Dismissed the Entire Action under Rule 1.420(b). In the same 6-20-94 order in which the trial court declined to dismiss with prejudice five of the counts of the Third Amended Complaint, R 843, 844, the court also ordered that those counts be streamlined in accordance with Rule 1.110(b). 6-20-94 Order of Court, R 851.

There is no doubt that Florida's courts have authority to order such compliance with Rule 1.110. Lutheran Senior Citizens' Foundation, Inc. v. B.F. Schumacher, 355 So.2d 861 (Fla. 3d DCA 1978), cert. denied, 361 So.2d 833 (Fla. 1978):

"Florida courts have long held that a plaintiff may be required to amend or recast a complaint, disposing of burdensome allegations. *L.C. Morris, Inc. v. Allison*, 277 So.2d 28 (Fla. 3d DCA 1973);

Cook v. Katiba, 152 So.2d 504 (Fla. 1st DCA 1963)." Lutheran at 863.

Interpreting the order in accordance with the presumption of correctness in which it is clothed in this Court, the "approval" of the five counts was conditioned on the appellants' compliance with the same order's insistence that they streamline those same counts per Rule 1.110. The appellants' failure to comply with this order authorized the Rule 1.420(b) dismissal which followed:

"In that appellant was ordered to streamline his pleading and failed to do so, the trial court, upon its discretion, had the authority to dismiss the . . . amended complaint. See Fla.R.Civ.P. 1.420(b) . . . the order of dismissal is hereby affirmed." Lutheran at 863 (citations omitted).

The appellants' citation of Beach Development Corp. v. Stimson, 159 So.2d 113 (Fla. 2d DCA 1964) is unavailing, because that case applies only to "rais[ing] objections to retained portions of an original pleading [only] when such objections were available and not urged or unsuccessfully urged on motion to the original pleading." Id. at 115. Beach Development has nothing to do with orders that, like the 6-20-94 order at bar, conditions approval of

counts upon their being streamlined.

7. The Test of *Beach Development* Was Itself Unmet. In addition, the appellants fail to meet Beach Development's condition that, in order to bar an objection, it must have been "available . . . on motion to the original pleading." Id. at 115. Here, the failure of the appellants to comply with the trial court's 6-20-94 order to streamline their complaint did not become available for objection until the appellants filed their Fourth Amended Complaint on 7-19-94. The city raised the appellants' noncompliance with the court's 6-20-94 streamlining order at its first opportunity, namely in its 9-2-94 "Rule 1.420(b) Motion for Involuntary Dismissal," R 940-942.

If the Court affirms on the basis of the arguments in the foregoing Part II, then it will not be necessary for the Court to consider the remaining arguments in this brief.

III. IN ITS 6-20-94 ORDER CONCERNING THE THIRD AMENDED COMPLAINT, THE TRIAL COURT PROPERLY DISMISSED WITH PREJUDICE COUNTS III, V, VII, VIII, IX, X, AND XI

8. Note: All References Hereafter to "the Complaint" Mean "the Third Amended Complaint," Unless Specified Otherwise.

9. The Trial Court Properly Dismissed with Prejudice Counts III, VII, VIII, IX, and XI, Because They Had All Previously Been Dismissed Twice, and Withdrawn Once. Generally, three failed attempts to state the same cause of action justify dismissal with prejudice. Price v. Morgan, 436 So.2d 1116 (Fla. 5th DCA 1983), rev. denied, 447 So.2d 887 (Fla. 1984):

"Thus, even though the number of amendments is not determinative of whether there has been an abuse of the privilege to amend, it has been said that 'generally three ineffective attempts to state the same cause of action are enough.' Trawick, *Florida Practice and Procedure*, § 14-2 at 208 (1980 Edition). Furthermore, in the absence of an abuse of discretion, a trial court's dismissal with prejudice will not be disturbed." Id. at 1122.

Likewise, Florida Gas Company v. Arkla Air Conditioning Company, 260 So.2d 220 (Fla. 1st DCA 1972):

" 'Three strikes are out' in a baseball game; Florida

Gas has been at bat four times. Under the most liberal construction of our modern rules, we hold that ample opportunity has been proffered to appellant." Id. at 221.

Moreover,

" 'liberality in permitting amendments decreases as the action progresses and as the number of amended pleadings increases.' " Alvarez v. DeAguirre, 395 So.2d 213, 217 (Fla. 3d DCA 1981) (citation omitted).

In sum, as the Third District stated in Kohn v. City of Miami Beach, 611 So.2d 538 (Fla. 3d DCA 1992):

"While there is no magical number of amendments which are allowed, we have previously observed that with amendments beyond the third attempt, dismissal with prejudice is generally not an abuse of discretion. **There is simply a point in time when defendants are entitled to be relieved from the time, effort, energy, and expense of defending themselves against seemingly vexatious claims.**" Id. at 539 (emphasis added).

That point had been reached with regard to Counts III, VII, VIII, IX, and XI of the Third Amended Complaint, because they had all previously been

dismissed twice, and withdrawn once, and detailed in the footnote.{[14]}

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[14] Count III (R 294-299, seeking overthrow of the 1988 Development Agreement) was pleaded as Count IV of the Second Amended Complaint (R 157-160), and dismissed in the 8-9-93 Order (R 259-260, 264); and was also pleaded as Count II of the First Amended Complaint (R 103-106), and dismissed in the 2-19-93 Order (R 124-125, 127); and was also pleaded as Count II in the original Complaint (R 21-24), and was withdrawn (Initial Brief, p. 4, n. 3).

Count VII (R 308-310, claiming duress to void a contract) was pleaded as Counts II and VII of the Second Amended Complaint (R 153-154, 167-168), and dismissed in the 8-9-93 Order (R 258-259, 261, 264); and was also pleaded as Count I of the First Amended Complaint (R 89-91, 101-103), and dismissed in the 2-19-93 Order (R 123-124, 127); and was also pleaded as Count I in the original Complaint (R 8, 19-20), and was withdrawn (Initial Brief, p. 4, n. 3).

Count VIII (R 310-315, seeking damages for non-voiding of the 1988 Development Agreement) was pleaded as Count VIII of the Second Amended Complaint (R 168-172), and dismissed in the 8-9-93 Order (R 261-262, 264); and was also pleaded as civil theft in Count V of the First Amended Complaint (R 111-112), and dismissed in the 2-19-93 Order (R 123, 127); and was also pleaded as civil theft in Count V of the original Complaint (R 28-30), and was withdrawn (Initial Brief, p. 4, n. 3).

Count IX (R 316-320, alleging arbitrary and capricious land use designations) was pleaded as Count IX of the Second Amended Complaint (R 172-177), and dismissed in the 8-9-93 Order (R 262, 264); and was also pleaded as

10. The City's Motion to Dismiss the Third Amended Complaint Stayed Within the Four Corners of the Complaint and the Exhibits Attached Thereto, and under Rule 1.110(d) Properly Asserted an Affirmative Defense Appearing on the Face of that Complaint. The appellants claim that "[t]he City, in its Motion to Dismiss alleged numerous factual matters which are nowhere to be found in the record of this matter." Initial Brief, p. 13. This is frivolous and simply untrue. All matters raised in the motion to dismiss stayed within the four corners of the complaint and the exhibits attached thereto.

The appellants claim that the city made "unproven factual allegations that Duane Avenue and the collector road were not one and the same." Initial

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Count III of the First Amended Complaint (R 106-109), and dismissed in the 2-19-93 Order (R 125, 127); and was also pleaded as Count III in the original Complaint (R 24-26), and was withdrawn (Initial Brief, p. 4, n. 3).

Count XI (R 323-326, seeking damages for delay) was pleaded as Count X of the Second Amended Complaint (R 177-180), and dismissed in the 8-9-93 Order (R 262, 264); and was also pleaded as Count VII of the First Amended Complaint (R 115-118), and dismissed in the 2-19-93 Order (R 126, 127); and was also pleaded as Count VII in the original Complaint (R 33-35), and was withdrawn (Initial Brief, p. 4, n. 3).

Brief, p. 13. This reveals a basic misunderstanding. As shown in the following argument justifying the dismissal with prejudice of Count III, the city instead argued thus: that the appellants' allegation in their complaint--that the designation of Duane Avenue as a collector road was required by the 1988 Development Agreement, and that therefore its non-designation triggered the automatic termination thereof--was irrevocably repugnant to the Agreement itself, which was attached to the complaint as Exhibit G. Such an argument is plainly within the boundaries of the complaint and within the boundaries of the law governing motions to dismiss. E.g., Franz Tractor Co. v. J.I. Case Co., 566 So.2d 524 (Fla. 2d DCA 1990), in which this Court held:

> "Any exhibit attached to a pleading is a part of the pleading for all purposes, and if an attached document negates a pleader's cause of action, the plain language of the document will control and may be the basis of a motion to dismiss." Id. at 526.

In addition, as authorized by Fla. R. Civ. P. 1.110(d), the city properly asserted an affirmative defense appearing on the face of the complaint, namely, the statute of limitations. Anderson v. Emro

Marketing Co., 550 So.2d 531, 532 (Fla. 1st DCA 1989); Moucha v. Burger King Corp., 450 So.2d 335, 336 (Fla. 5th DCA 1984).

11. The Trial Court Properly Dismissed Count III of the Third Amended Complaint with Prejudice. Count III alleged in pertinent part that

"The designation of Duane Avenue as a collector road in the P.P.C. Plan . . . was a de jure and a de facto condition precedent of the Development Agreement . . . . " Complaint, ¶ 91.

"The P.P.C. . . . has refused . . . to designate Duane Avenue . . . as a collector road . . . ." Complaint, ¶ 153.

"The Development Agreement further provides that if the designation in the P.P.C. Plan is not obtained . . . the Agreement automatically terminates . . ." Complaint, ¶ 158.

The trial court correctly dismissed these claims and the remainder of Count III with prejudice. As correctly reasoned by the trial court,

"Count III of the Third Amended Complaint fails to state a cause of action for equitable relief based upon the original Development Agreement executed by the parties. Specifically, Count III contains four

(4) fatal repugnancies, one of which was disallowed by this Court's previous February, 1993 Order, and yet again, for a second time, by this Court's August 6, 1993 Order. [R 259-260, filed 8-9-93.]

"As was previously observed by this Court in its earlier Order Granting Motion to Dismiss Amended Complaint, and this Court's August 6, 1993 Order, Count III (Count IV of the Second Amended Complaint) 'demonstrates an impermissible inconsistency between the allegations contained therein and the written terms of the Development Agreement.' The impermissible inconsistency between the allegations contained in the Third Amended Complaint and the written terms of the Development Agreement not only remain, but are further amplified. In the Plaintiffs' Third Amended Complaint they have, for the first time, included the site plan exhibit which was originally attached to the 1988 Development Agreement. By including the missing exhibit to the 1988 contract the irrevocable nature of the fatal repugnancy is augmented. In particular, the inclusion of the Site Plan Exhibit to the 1988 Development Agreement reveals a proposed collector road running through the project. Nowhere is there any reference in the

Site Plan Exhibit to Duane Avenue. The Site Plan makes no reference whatsoever to Duane Avenue. It only refers to a generic and unnamed road, not even designated as a collector road, running through the Site Plan.

"The Plaintiffs' repeated disregard of this Court's previous two Orders alone require dismissal with prejudice, notwithstanding the three (3) further repugnancies contained in Count III of the Third Amended Complaint.

"This aside, the repugnancy between complaint and exhibit negates the cause of action and requires dismissal. See Franz Tractor Co. v. J.I. Case Co., 566 So.2d 524 (Fla. 2d DCA 1990), in which the court held:

'Any exhibit attached to a pleading is a part of the pleading for all purposes, and if an attached document negates a pleader's cause of action, the plain language of the document will control and may be the basis of a motion to dismiss.' Id. at 526.

"The First District Court of Appeal held likewise in Striton Properties v. The City of Jacksonville Beach, 533 So.2d 1174 (Fla. 1st DCA 1988).

"Since there is no provision in the 1988

Development Agreement, nor its exhibits, which requires as a condition precedent the designation of Duane Avenue as a collector road, Plaintiffs have failed to state a cause of action for termination of the 1988 Development Agreement as set out in Count III and its companion Count VIII of the Third Amended Complaint.

"In addition, a further impermissible inconsistency between the allegations contained in the Third Amended Complaint and the written terms of the Development Agreement exists in the present pleadings. The 1988 Development Agreement, at paragraph 6, provides for the automatic termination if 'the land use designations . . . contemplated by this agreement [are not] placed on the property.' The complaint then alleges that Duane Avenue was not designated as a collector road. A review of the 1988 Contract reveals that the term 'property' is defined in the contract to mean only the property owned by E. B. Rood and Keith R. Collen (and now Collen's successor, Bruce McLaughlin).{[15]}

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[15] *Appellees' Note:* EXHIBIT G to the Third Amended Complaint, p. 0897, Recital A, last sentence ("The said property owned by the Owners shall hereinafter be referred to as 'Property.' ")

Because Duane Avenue is not Plaintiffs' property, and because the termination provisions of the Development Agreement apply only to Plaintiffs' property, the refusal to designate Duane Avenue as a collector road by Pinellas County cannot trigger the termination provisions of the Development Agreement. In addition to the reasons set forth earlier, based upon this repugnancy, Counts III and VIII are dismissed with prejudice." 6-20-94 Order, R 844-846.

For these reasons, the trial court properly dismissed Count III of the Complaint with prejudice.

The city also points out that a number of other arguments supporting the dismissal with prejudice of this count have been omitted here for lack of space, but are available for the Court's consideration in the city's 10-13-93 motion and memorandum to dismiss the complaint, R 443, at pages 6-10 thereof (R 448-452). {[16]}

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[16] On page 29 of their Initial Brief, the appellants claim that "[a]t issue is the City's admitted failure to attach the Comprehensive Plan to the Ordinance adopting the plan." (Emphasis added.) This is utterly false. No such "admission" exists within the four corners of the complaint or its exhibits. The Third Amended Complaint alleges only that "City Staff have expressed uncertainty as to the official

12. The Trial Court Properly Dismissed Count V of the Third Amended Complaint with Prejudice. Count V of the complaint alleged that "No Land Use Element of the Comprehensive Plan is attached to Ordinance 80-12," R 303, ¶ 186, and the appellants sought a declaratory judgment that Oldsmar's Comprehensive Plan was null and void ab initio. R 304. As demonstrated below, this count was properly dismissed with prejudice by the trial court.

11-A. After Thirteen Years of Public Acquiescence in the Substance of the Ordinance, Which All the While Guided the City's Development, Public Policy Forbade the Appellants' Attack on the Validity of the Ordinance Because of Alleged Procedural Irregularities. This is a well-established doctrine. Trainor v. City of Wheat Ridge, 697 P.2d 37 (Colo. 1st DCA 1984):

"In 1972, the City passed Ordinance 98 which repealed [an earlier zoning law] and enacted

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status, or lack thereof, of the document enforced as the Land Use Element of the Comprehensive Plan." Count V, ¶ 188, R 303. "[I]n ruling on such a motion [to dismiss] we are confined to a consideration of the allegations found within the four corners of the complaint." Cook v. Sheriff of Collier County, 573 So.2d 406, 408 (Fla. 2d DCA 1991).

'comprehensive zoning regulations' for the City . . . In March 1982 plaintiffs again applied to the City to rezone their property from A-1 to C-1, which request the Planning Commission again denied. Shortly thereafter, . . . plaintiffs commenced this action seeking a declaratory judgment that the property is zoned C-1 . . .

"[Plaintiffs] challenged the adequacy of the procedures followed in its enactment . . . However, after long public acquiescence in the substance of an ordinance, public policy does not permit such an attack on the validity of the ordinance because of procedural irregularities. *Edel v. Filer Township*, 49 Mich.App. 210, 211 N.W.2d 547 (1973); *Taylor v. Schlemmer*, 353 Mo. 687, 183 S.W.2d 913 (1944); *Struyk v. Samuel Braen's Sons*, 17 N.J. Super. 1, 85 A.2d 279 (1951); see also *Fifth Church of Christ v. Pigg & Son, Inc.*, 109 Colo. 103, 122 P.2d 887 (1942); I A. Rathkopf & D. Rathkopf, *Law of Zoning & Planning* § 10.14 (4th ed. 1984); I R. Anderson, *American Law of Zoning* § 4.08 (2d ed. 1976).

"Ordinance 98 had been in effect, guiding the City's development, for over 10 years before plaintiffs' complaint. Thus, there had been

extensive public reliance on the ordinance, thereby immunizing it from belated attack on the various procedural grounds which are asserted. *Edel v. Filer Township*, supra; *Benequit v. Borough of Monmouth Beach*, 125 N.J.L. 65, 13 A.2d 847 (1940); *Ninth Street Improvement Co. v. Ocean City*, 90 N.J.L. 106, 100 A. 568 (1917). **Therefore, the trial court was correct in dismissing the complaint."** Trainor at 38-39 (emphasis added).

The appellants cited below the case of Bal Harbour Village v. State ex rel. Giblin, 299 So.2d 611 (Fla. 3d DCA 1974), cert. denied, 311 So.2d 670 (Fla. 1975), in an attempt to overcome the foregoing Trainor case and the authorities cited therein. Bal Harbour is irrelevant because its invalidation of the ordinance therein was based on that city's failure to follow a Florida statute requiring publication of notice, which "is jurisdictional and cannot be waived." Id. at 616. The instant plaintiffs have failed to allege that the city violated any Florida statute whatsoever, or any jurisdictional, unwaivable requirement.

For the reasons set forth above, the trial court properly dismissed Count V with prejudice.

11-B. Count V Was Properly Dismissed With Prejudice Because It Introduced New Issues or Materially Varied the Grounds of Relief. Count V pleaded a new cause of action different than that pleaded in any of the three previous complaints. **Indeed, the appellants admitted below that "Counts V and X of the Third Amended Complaint . . . do 'Introduce New Grounds or Materially Vary the Grounds of Relief.' "** Appellants' 3-28-94 "Motion to Strike 'Defendant's Supplementary Memorandum,' Filed March 18, 1994 and Initial Memorandum of Law," R 889, 890, ¶ 3 (emphasis added). Given this admission, and under the authorities cited below, the trial court properly dismissed Count V (and its companion, Count X) with prejudice.

This new count (Count V) required proof of some different essential facts than are required by any of the other actions set forth in the previous complaints. Specifically, and assuming arguendo that Count V stated a cause of action, then in order to prevail, the appellants would have had to introduce evidence that the Land Use Element was unattached to Ordinance 80-12 at the time of its passage.

Such evidence is utterly irrelevant to each and

every other count alleged in all of the appellants' prior complaints. Consequently Count V presented a cause of action different than prior ones, and also presented new issues and varied grounds for relief. Accordingly, under the doctrine of "departure in pleading," it was improper for the appellants to plead it, and therefore Count V was properly dismissed with prejudice. Warfield v. Drawdy, 41 So.2d 877 (Fla. 1949); Cox v. Seaboard Coast Line Railroad Co., 360 So.2d 8 (Fla. 2d DCA 1978), cert. denied, 367 So.2d 1123 (Fla. 1979); Dunn v. Campbell, 166 So.2d 217, 217-219 (Fla. 2d DCA 1964); Bondu v. Gurvich, 473 So.2d 1307 (Fla. 3d DCA 1984), rev. denied, 484 So.2d 7 (Fla. 1986):

"[B]ecause Bondu's proffered amendment to her original action (a) sets forth a cause of action (b) which is different from the counts in her earlier action, the order denying her leave to amend must be affirmed.

"[I]f the proffered amendment pleads a cause of action different than that pleaded in the [prior] complaint, the rule authorizing amendments does not apply." Bondu at 1310, and 1310, n. 2 (emphasis added).

The other cases cited above are quoted in pertinent

part in the city's 3-18-95 supplementary memorandum, R 805, at pages 17-19 thereof (R 821-823).

For all of these reasons, the trial court properly dismissed Count V prejudice.{[17]}

11-C. Count V Was Properly Dismissed With Prejudice Because of the Statute of Limitations. The sole ground on which the trial court dismissed this count was the time-bar of the statute of limitations:

> "Section 95.11(3)(p), Florida Statutes, requires that '[a]ny action not specifically provided for in these statutes' must be commenced within four (4) years. The complaint reveals that the ordinance under attack was adopted over 13 years ago, in December 1980. Accordingly, Counts V and X of the Third Amended Complaint are time-barred and must be dismissed with prejudice." 6-20-94 Order, R 846-847

This holding is correct, for the following reasons.

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[17] The appellants contend that they had been given leave of court to plead Count V and its companion, Count X. No such order giving such leave is in the record on appeal, and therefore no such order is before this Court. Even if it were, nevertheless prior leave would not immunize the counts from the cited binding precedents of the Supreme Court and of this Court.

The appellants admit that Rood and McLaughlin's predecessor Collen bought their properties in 1982. Complaint, ¶¶ 21-22, R 269. They admit that beginning in 1985, Rood applied for the issuance of site development approvals and building permits for a shopping center in accordance with the superseded 1972 Zoning Ordinance. Complaint, ¶¶ 34-35, R 271. They admit that Collen contemporaneously "made enquiries of the City with respect to the development of the property in accordance with OLDSMAR's [superseded] Zoning Ordinance." Complaint, ¶ 37, R 272. They admit that "Rood's application . . . was denied by OLDSMAR because the proposed use was inconsistent with the Comprehensive Plan designation of Urban Low Density Residential." Complaint, ¶ 36, R 272. They admit that this denial occurred before the execution by Rood of a contract whereby he reserved sewage capacity for his property, on 7-1-86. Complaint, ¶¶ 51-54, R 10-11. Thus, Rood knew that the Comprehensive Plan made impossible the extensive development of his property that he desired, and he knew this no later than 7-1-86. Using this as the date that Rood became chargeable with knowledge of the alleged procedural infirmity in the passage of

the Comprehensive Plan, then under § 95.11(3)(p), Fla. Stat. (1985), he had four years to file a suit attacking the passage of that plan--that is, until 7-1-90. However, the suit was not filed until 8-26-93, as Counts V and X of the complaint, R 303, 321. Thus it is time-barred as to Rood. Doe v. Cutter Biological, 813 F. Supp. 1547 (M.D. Fla. 1993), affirmed, 16 F.3d 1231 (11th Cir. 1994) (construing Florida law):

"Florida law does not require that Plaintiff know the full extent of his injury. Plaintiff need only have notice of the possible invasion of his legal rights. University of Miami v. Bogorff, 583 So.2d 1000 (Fla. 1991). By October 1985, Plaintiff knew that he was HIV positive and thus, that he had suffered an injury; *and* Plaintiff knew that he was HIV positive as a result of being treated with HIV-contaminated factor concentrate. [Likewise--as alleged within the four corners of the complaint and the exhibits--by July 1986 Rood knew that he would not be allowed to develop his land as he wished; and he knew that the city was relying on the Comprehensive Plan as legal authority to block his wishes.] The fact that Plaintiff did not test positive for AIDS until 1990 [and the fact that

Reed did not discover the alleged nonattachment of the Comprehensive Plan to the ordinance until 1993] is not dispositive because under Florida law, the statute of limitations begins to run even if the full consequences of the injury are not known. *Byington v. A.H. Robins Co., Inc.*, 580 F. Supp. 1513 (S.D. Fla. 1984); *City of Miami v. Brooks*, 70 So.2d 306 (Fla. 1954)." Doe at 1555 (emphasis of "not" is added; emphasis of "and" is in original).

Nor is the doctrine of equitable tolling available to the appellants. Armbrister v. Roland International Corp., 667 F. Supp. 802 (M.D. Fla. 1987) (construing Florida law):

"In order to benefit from the doctrine of equitable tolling, Plaintiffs must show: first, that they failed to discover and *could not* have discovered, the facts underlying their claim before the applicable statute ran, and second, that this was so because Defendants prevented Plaintiffs from discovering the facts by 'fraudulent means.' See *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338 (5th Cir. 1971); *Nardone v. Reynolds*, 333 So.2d 25 (Fla. 1976); *Sellers v. A.H. Robins Co.*, 715 F.2d 1559 (11th Cir. 1983). Plaintiffs have failed to establish either requirement." Id. at 810 (emphasis original).

Having been hired by Rood to negotiate with the city concerning the Comprehensive Plan's prohibition of the development that Rood wanted, Complaint, ¶ 38, and EXHIBIT E thereto, McLaughlin likewise learned of the injury caused by the Plan, and no later than June 13, 1986, the date of EXHIBIT E of the complaint. That exhibit consists of a 6-13-86 letter signed by McLaughlin and complaining of "the present conflict between the City's Comprehensive Land Use Plan and its [superseded] Zoning Ordinance," and of the recommended "denial of Mr. Rood's requests to amend the plan." EXHIBIT E, p. 1. Moreover, as admitted successor to Collen (¶ 104 of complaint) and therefore as a joint venturer with Rood, McLaughlin became bound by Rood's failure to file suit.{[18]} Complaint, ¶¶ 60 and 65; 1988

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[18] The relation of joint venturers "is governed by partnership law." Drew v. Hobbs, 140 So. 211, 212 (Fla. 1932). This includes statutory partnership law. Campbell v. A.B. Taff & Sons, Inc., 519 So.2d 1039, 1041 (Fla. 1st DCA 1988). Therefore, § 620.60(1), Fla. Stat. (1991), which is part of the Uniform Partnership Act, is binding in this case. As does Hobbs, § 620.60(1) makes Rood's failure to sue timely binding on the entire joint venture:

> "The act of every partner . . . binds the partnership . . . ." § 620.60(1), Fla. Stat. (1991).

Development Agreement, EXHIBIT G:

"E. The Property will be treated as a unified development for the purpose of this Development Agreement. The parties agree that for all purposes of review for development approvals, for the provision of all of the City services, for the review of rezoning requests, land use plan amendment requests, site plan reviews and for all other purposes, the property shall be deemed one unified parcel of land even though the Property consists of two separate ownerships. . . Any reference in this Agreement to the Owners contemplates E.B. Rood and Keith R. Collen or their successors in interest . . . ." 1988 Development Agreement, EXHIBIT G, pages 0898 and 0911 (emphasis added).

Even if the four-year statute of limitations is measured from the date of this Agreement--February 4, 1988, EXHIBIT G, p. 0897--then the deadline was February 4, 1992. The appellants' attack on the ordinance was not filed until over a year later, on

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Likewise, § 620.64, Fla. Stat. (1991):

> **"Liability of incoming partner.**--A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when the obligations were incurred . . . ."

August 27, 1993, as Counts V and X of the complaint. R 303, 321.

11-D. Conclusion as to Count V. A trial court's judgment will be upheld on any appropriate legal or equitable theory, even if not argued below. Springfield v. Department of Environmental Protection, 648 So.2d 802 (Fla. 1st DCA 1994):

" 'the law is so well settled as to require no citation of authority to the effect that a correct result or judgment, though based on an erroneous reason or rule, requires affirmance on appeal. In other words, it is the final conclusion or judgment which counts and not the reasons therefor.' *Jones v. Dove*, 300 So.2d 758, 758-59 (Fla. 1st DCA 1974) (on rehearing); *accord, e.g., Stuart v. State*, 360 So.2d 406 (Fla.1978); *Robinson v. State*, 393 So.2d 33 (Fla. 1st DCA 1981)." Id. at 804.

Moreover, the city did argue to the trial court the theories of public policy and departure in pleading set forth in parts 11-A and 11-B, above, in its 3-18-95 "Defendant City of Oldsmar's Supplementary Memorandum in Support of Its Motion to Dismiss Counts II, V, X, and XII of the Third Amended Complaint," R 821-824. The theory of joint venture was generally argued below, albeit not in connection

with Count V, in the city's 10-13-93 motion and memorandum to dismiss the complaint, R 443, 469-482.

For all of the foregoing reasons, the trial court properly dismissed Count V with prejudice.

13. Count VI, Which Was Dismissed **Without** Prejudice, Is Not on Appeal. On page 22 of their Initial Brief, the appellants argue error in the dismissal without prejudice of Count VI, which sought rescission of a contract for purchase of sewage capacity, attached to the complaint as EXHIBIT F. R 305-307.

This count is not on appeal. It is not listed in either the Notice of Appeal, R 861, nor in the corresponding Statement of Judicial Acts to be Reviewed, R 876. Moreover, a dismissal without prejudice is not a final order subject to review. Augustin v. Blount, Inc., 573 So.2d 104, 105 (Fla. 1st DCA 1991).

If the Court disagrees, then the appellees respectfully rely on the arguments as to this count set forth in the city's 10-13-93 motion and memorandum to dismiss the complaint, R 443, 453-463.

14. The Trial Court Properly Dismissed Count VII

of the Third Amended Complaint with Prejudice. Count VII sought rescission of the sewage capacity contract (Complaint, EXHIBIT F), on grounds that Rood executed it under duress. R 308-310. As the trial court held and quoted,

" 'It must be shown (a) that the act sought to be set aside was effected involuntarily and thus not as an exercise of free choice or will and (b) that this condition of mind was caused by some improper and coercive conduct of the opposite side.' City of Miami v. Kory, 394 So.2d 494, 497 (Fla. 3d DCA), rev. denied, 407 So.2d 1104 (Fla. 1981)." 6-20-94 Order, R 847.

Because nothing alleged in this count rose to the level of duress, it was properly dismissed with prejudice.

The city also points out that a number of other arguments supporting the dismissal with prejudice of this count have been omitted here for lack of space, but are available for the Court's consideration in the city's 10-13-93 motion and memorandum to dismiss, R 443, at pages 22-26 thereof (R 464-468).

15. Count VIII, Being the Damages Counterpart to Count III, Was Properly Dismissed with Prejudice for the Same Reasons that Count III Was So

Dismissed. Accordingly, the appellees rely on the reasons set forth above as to Count III to support the dismissal with prejudice of Count VIII.

The city also points out that a number of other arguments supporting the dismissal with prejudice of this count have been omitted here for lack of space, but are available for the Court's consideration in the city's 10-13-93 motion and memorandum to dismiss, R 443, at pages 26-41 thereof (R 468-483).

16. The Trial Court Properly Dismissed Count IX of the Third Amended Complaint with Prejudice. The city adopts for its argument here the reasoning of the trial court as to this count, found in the court's 6-20-94 Order at R 848-850.

The city also points out that a number of other arguments supporting the dismissal with prejudice of this count have been omitted here for lack of space, but are available for the Court's consideration in the city's 10-13-93 motion and memorandum to dismiss, R 443, at pages 41-60 thereof (R 483-502).

17. Count X, Being the Damages Counterpart to Count V, Was Properly Dismissed with Prejudice for the Same Reasons that Count V Was So Dismissed.

Accordingly, the appellees rely on the reasons set forth above as to COUNT V to support the dismissal with prejudice of Count X.

18. The Trial Court Properly Dismissed Count XI of the Third Amended Complaint with Prejudice. Count XI sought to state a taking cause of action under 42 U.S.C. § 1983, based on what the appellants called "causing delays by refusing to approve a reasonable use of Plaintiffs' property . . . ." Complaint, ¶ 280, R 323. Although the appellants claimed that the city refused to approve "any reasonable development proposal" and so "took . . . all economically beneficial use of Plaintiffs' property," Complaint, ¶ 282, R 323-324, they contradicted themselves by conceding that a marketable site plan was approved in the 1988 contract. Complaint, ¶ 102, R 285. This repugnancy within the count negated the cause of action and required dismissal. Peacock v. General Motors Acceptance Corporation, 432 So.2d 142 (Fla. 1st DCA 1983):

> "We affirm the dismissal of the . . . second count . . . Contradictory allegations within a single count neutralize each other and render the count insufficient on its face." Id. at 146.

Appellants asserted below that the marketable site plan no longer exists because it is contingent on the 1988 Contract, which they claim "automatically terminated." However, appellants cite no ordinance or resolution or contractual provision or any other authority to show that the marketable site plan cannot stand without the 1988 Contract.

In addition, as found by the trial court, the appellants failed to allege any proper basis for jurisdiction for this § 1983 claim. They are required to give "a short and plain statement of the grounds upon which the court's jurisdiction depends." Fla.R.Civ.P. 1.110(b)(1) (emphasis added). Instead, they alleged only conclusions of law, e.g., that "[t]his court has concurrent jurisdiction with the United States District Court under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 pursuant to *Howlett v. Rose*, 110 S.Ct. 2430 (1990)." Neither this nor anything else in this count constitutes a statement of grounds--facts showing jurisdiction--supporting jurisdiction over this count. Fayson v. Fayson, 482 So.2d 523, 525 (Fla. 5th DCA 1986).

The city also points out that a number of other arguments supporting the dismissal with prejudice of this count have been omitted here for lack of space,

but are available for the Court's consideration in the city's 10-13-93 motion and memorandum to dismiss, R 443, at pages 61-80 thereof (R 503-522).

CONCLUSION

For all of the foregoing reasons, the 10-20-94 Order involuntarily dismissing the action under Rule 1.420(b) should be affirmed. Affirmance of that order would moot the appeal of the 6-20-94 Order, which dismisses with prejudice seven of the twelve counts of the Third Amended Complaint.

Alternatively, the 6-20-94 Order should be affirmed.

Respectfully submitted,

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Attorney for Appellees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by first class U.S. Mail to E. B. Rood, Esquire, 200 N. Pierce Street, Tampa, Florida 33602; to R. Bruce McLaughlin, 900 Gulf Blvd., #303, Indian Rocks Beach, Florida 34635; and to Eric Ager, 3375 Hunt Club Drive, Clearwater, Florida 34621, this 1st day of June, 1995.

_____

Attorney

IN THE COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

E. B. ROOD and R. BRUCE McLAUGHLIN,

Appellants,

v.

Case No. 94-02479
Lower Tribunal
Case 92-3764

THE CITY OF OLDSMAR,

Appellee.

_____/

APPELLANTS' MOTION FOR CLARIFICATION AND RECONSIDERATION

COME NOW Appellants, E. B. Rood and R. Bruce McLaughlin, *pro se*, pursuant to Rule 9.330, Fla.R.App.P., and move for clarification and reconsideration of the Order of the Court entered on April 12, 1996, and as grounds wherefore would show:

I. AS TO COUNTS I AND V OF THE FOURTH AMENDED COMPLAINT

1. The Court reinstated Count I of the Fourth Amended Complaint, which count sought a Declaratory Judgment that Oldsmar had unlawfully

amended an Ordinance by a resolution and further sought an injunction against the enforcement of the resolution.

2. Appellants also sought a refund of funds paid to the City pursuant to that resolution, so that they would have the complete remedy mandated by Florida law: *Thomas v. Gilbe, Inc.*, 104 So.2d 397 (Fla. 2d DCA 1958). [1]

3. Plaintiffs initially sought injunctive relief for the refund of fees, (R at 20). However, the trial court decided (R at 258) (dealing with what was then Count II of the complaint,) that Appellants should plead for recision of contract in order to obtain the funds paid to the City under the unlawful resolution.

4. In adjudicating the Third Amended Complaint, (R at 847,) the Trial Court dismissed the action for recision of contract **without prejudice**. As this Court pointed out during oral argument, it is not difficult to plead for recision of contract, (and Appellants in their Initial Brief showed how closely

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[1] Because the City asserted that Appellants were not entitled to **both** a Declaratory Judgment and Injunctive Relief, (*e.g.* R at 450,) and to damages (*e.g.* R at 502), Appellants were forced to plead the Declaratory Judgment and Injunction actions in counts separate from the damage counts.

they had tracked Professor Trawick's form in this count).

5. In the Fourth Amended Complaint, Count V sought recision of contract, in accordance with the order of the trial court stating that this was the proper cause of action, and in accordance with Professor Trawick's form, thereby curing the alleged defects in this Count found in the Third Amended Complaint.

6. Since

a) Appellants are entitled to monetary relief accompanying their Declaratory Judgment action, *Thomas, supra*;

b) Appellants followed the direction of the trial court in pleading this action as a complaint for recision of contract;

c) this Count was dismissed without prejudice in the Third Amended Complaint;

d) this count was repled in the Fourth Amended Complaint in strict compliance with Professor Trawick's outline; and

e) the Declaratory Judgment action, alone, leaves Appellants in the position where

the Resolution of the City of Oldsmar may be invalidated, but Appellants will be without means to recoup the $715,000.00 (seven hundred and fifteen thousand dollars,) paid to the City pursuant to that Resolution.

Count V of the Fourth Amended Complaint, seeking recision of contract as the companion damage action to Count I, reinstated by this Court, should also be reinstated.

II. AS TO COUNT III OF THE FOURTH AMENDED COMPLAINT AND COUNT IX OF THE THIRD AMENDED COMPLAINT

7. This Court reinstated Count III of the Fourth Amended Complaint, seeking a Declaratory Judgment that the City's Comprehensive Plan designations unlawfully mimicked those of the Pinellas County Planning Council and were arbitrary and capricious as applied to Appellants' properties.

8. The monetary damages flowing from this mimicking and arbitrary and capricious action were sought in Count IX of the Third Amended Complaint. (R at 317).

9. Since Appellants are entitled to monetary

relief as well as a Declaratory Judgment, (*Thomas, supra*,) and since this Court has reinstated the Declaratory Judgment action, the monetary damages action, (Count IX of the Third Amended Complaint,) should also be reinstated.

III. AS TO COUNTS IV AND THE FIRST COUNT NUMBERED "VI" [2] OF THE FOURTH AMENDED COMPLAINT

10. Appellants confessed error in including in the Fourth Amended Complaint, without leave of the trial court, Count IV seeking a Declaratory Judgment that the Development Agreement had been terminated by the passage of time, and the passage of time damage count (Count VI).

11. These two counts did not ripen (including the requisite pursuit of administrative remedies,) until just before the filing of the Fourth Amended Complaint.

12. Accordingly, Appellants urge this Court to affirm the dismissal of Count IV and the passage of

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[2] Unfortunately the Fourth Amended Complaint includes two counts numbered as "VI", the first alleging a Refusal to Terminate Development Agreement and Refund Fees, based on the passage of time, (hereinafter "the passage of time damage count",) and the second alleging Slander of Title, (hereinafter the "slander of title count").

time damage count of the Fourth Amended Complaint, **without prejudice** to a Motion for Leave to Amend and their subsequent incorporation in the Complaint to be adjudicated.

IV. AS TO THE COUNTS NUMBERED "VI" IN THE FOURTH AMENDED COMPLAINT

13. For the reasons set forth in Part III, *supra*, Appellants request clarification from this Court that this Court intended to reinstate the slander of title count, approved by the trial court as Count XII in the Third Amended Complaint, (R at 851), as the Count VI reinstated by this Court. (The slander of title count is also **part** of the monetary damage count coinciding with the Declaratory Judgment action reinstated by this Court in Count II of the Fourth Amended Complaint.)

V. AS TO COUNTS III and VIII OF THE THIRD AMENDED COMPLAINT

14. Count III of the Third Amended Complaint, (dismissed with prejudice, R at 851) sought a Declaratory Judgment that the original Development Agreement had automatically terminated because Pinellas County refused to permit the extension of a collector road known as Duane Avenue through Rood's property. Count VIII of the Third Amended

Complaint was the damage action seeking a refund of monies paid to the City by Appellants pursuant to the Development Agreement.

15. These counts were dismissed by the trial court because of alleged repugnancies between the complaint and the Exhibits thereto.

16. In particular, Appellants pled, (R at 313,) that the construction of Duane Avenue through Rood's property was a condition precedent of the Development Agreement. Although the Development Agreement does not make this statement in so many words, there is ample support for it, as follows:

a) See R at 853 - 854, listing other portions of the Development Agreement which imply this requirement; and

b) In a Petition to the Florida Department of Community Affairs, the City also pled that the construction of Duane Avenue through Rood's property was a condition precedent **(the exact same words used by Appellants,)** of the Development Agreement, (R at 277, ¶

6; and especially R at 380, ¶ 24). [3] This admission is binding on the City: *Curr V. Helene Transportation Co.*, 287 So.2d 695 (3d DCA 1974) and *Purgess v. Sharrock*, 33 F.3d 134 (2d Cir. 1994).

17. Since the lower Court specifically found that the construction of Duane Avenue through Rood's property was not a condition precedent to Development Agreement (R at 124) when the City had previously admitted that it was (R at 380, p. 24,) the dismissal of these Counts based on an alleged repugnancy was in error.

18. Further, the question of whether Rood was required to extend Duane Avenue through his property as a condition precedent of the Development Agreement was a question of fact which should not have been resolved in a Motion to

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[3] The Petition to the Department of Community Affairs, as it appears in the record, is incomplete and unsigned. However, counsel for the City stipulated to the trial court that a complete petition was prepared and filed, and that counsel for the City did sign the petition, including the allegation that the construction of Duane Avenue through Rood's property was a **condition precedent** of the Development Agreement.

Dismiss: *Guritz v. American Motivate, Inc.*, 386 So.2d 60 (Fla. 2d DCA 1980).

19. Nonetheless, the Trial Court adjudicated this matter based on a factual determination of alleged repugnancies between the Complaint and Exhibit (R at 259 - 260).

20. Since the City is bound by the previous admission of its counsel, and since the lower Court adjudicated facts in the context of a Motion to Dismiss, Counts III and VIII of the Third Amended Complaint should be reinstated.

WHEREFORE, Appellants respectfully move this Honorable Court to clarify and reconsider its Order of April 12, 1996, [4] by:

1. Reinstating Count V of the Fourth Amended Complaint as the damage count corresponding to Count I, already reinstated;
2. Dismissing Counts IV and VI (the passage of time counts) of the Fourth Amended Complaint, **without prejudice** to a Motion for Leave to Amend before the Trial Court;

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[4] Appellants do not seek reconsideration of the Order with respect to Count VII of the Fourth Amended Complaint, or with respect to Counts V, VII, X, and XI of the Third Amended Complaint.

3. Reinstating Count IX of the Third Amended Complaint as the count seeking monetary damages as a companion to Count III of the Fourth Amended Complaint, now reinstated by this Court;
4. Reinstating Counts III and VIII of the Third Amended Complaint.

Respectfully submitted,

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I hereby certify that a true copy of the foregoing has been furnished by regular United States Mail to Bryan Kutchins, Esq., P.O. Box 1063, 584, Oldsmar, Fl., 34677, and to Eric Ager, 3375 Hunt Club Drive, Clearwater, Fl., 34621, this the ____ day of April, 1996.

_____

E. B. Rood

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